

Linking Competition and Trade Policies in Central and Eastern European Countries

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Enforcement of competition law and liberalization of trade are important elements of the transition to a market economy. Competition policy can be designed to support a liberal trade policy stance.

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Summary findings

Hoekman and Mavroidis explore options for Central and Eastern European (CEE) governments to make competition law enforcement more sensitive to trade and investment policy, thereby supporting liberal trade policy.

The competition laws of these countries tend to resemble European Union (EU) competition disciplines (Articles 85–86 of the Treaty of Rome), but give competition authorities great scope for discretion in interpreting the relevant statutes. Much can be done through appropriate wording of criteria and implementation guidelines within the framework of existing legislation to subject trade policy to competition-policy scrutiny.

A liberal trade policy and active enforcement of competition laws will be crucial not only for national welfare, but also for eliminating the threat of contingent protection by EU firms. When CEE countries face antidumping threats or actions from EU countries, Hoekman and Mavroidis suggest that they seek a link between competition law enforcement and antidumping investigations in the context of the association

agreements with the European Union. That is, the European Commission could be asked to apply competition policy criteria in antidumping investigations against products originating in CEE countries, ensuring that there is a threat to competition, not just a threat to a European Union competitor. This treatment could be sought informally during the transitional period.

Generally, since the CEE countries have adopted competition legislation comparable to that of the European Union, it seems safe to assume that if they enforce their competition laws vigorously, EU-consistent minimum standards will be respected.

Until the association agreements are fully implemented, it is important to reduce to a minimum the risk of being treated as an “unfair trader.” Safeguard actions will remain possible until EU membership has been attained. But safeguard protection is more difficult to seek and obtain if there is only a weak case for arguing that Central and Eastern European firms are benefiting from trade barriers, state aids, or various government-maintained entry barriers.

This paper — a product of the Europe and Central Asia, Middle East and North Africa Regions Technical Department, Private Sector and Finance Team — is part of a larger effort to monitor and analyze developments in regional and global trade policy of relevance to the Europe and Central Asia and the Middle East and North Africa regions. Copies of the paper are available free from the World Bank, 1818 H Street NW, Washington, DC 20433. Please contact Faten Hatab, room H8-087, extension 35835 (43 pages). August 1994.

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Central and Eastern European Countries***

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Summary

Six Central and Eastern European (CEE) countries—Bulgaria, the Czech Republic, Hungary, Poland, Romania, and the Slovak Republic—have negotiated far-reaching Association Agreements with the European Union (EU), so-called Europe Agreements. These Agreements will result in free trade in goods, and include commitments by the CEE countries to adopt many of the disciplines of the Treaty of Rome. This paper focuses on one aspect of the Europe Agreements: competition policy, and does so from the perspective of the trade policy stance of the CEE countries. It explores possible institutional mechanisms that could be implemented by CEE governments with a view to increasing the sensitivity of competition law enforcement to trade and investment policy.

The objective of competition policy in most jurisdictions tends to be efficient resource allocation, and thereby the maximization of national welfare. Governments pursue trade policies for a variety of reasons, of which efficiency is usually not one. An active trade policy redistributes income between segments of the population by protecting specific industries and the factors of production employed there, and usually does so in an inefficient manner. Trade policy is consequently often inconsistent with the objectives underlying competition policy. The way this inconsistency is frequently put is that competition law aims at protecting *competition* (and thus economic efficiency), while trade policy aims at protecting *competitors* (or factors of production). The issue facing governments is to ensure that competition prevails. This requires the design of institutional mechanisms that allow governments to explicitly consider the competition implications of particular trade or investment policies.

The Europe Agreements require that the CEE countries adopt the basic competition rules of the EU for practices that affect trade between the EU and each Central and East European country. These rules relate to agreements between firms restricting competition, abuse of dominant position, the behavior of public undertakings (state-owned firms) and competition-distorting state aids (Articles 85, 86, 90 and 92 of the EEC Treaty respectively). Thus, competition policy is defined widely to include the behavior of governments as well as of firms. Almost all the CEE countries have passed competition legislation and allocated the responsibility for enforcing their competition rules. There are inconsistencies with EU language and implementation criteria/guidelines, some of them substantial, but the thrust of existing provisions is certainly pro-competitive.

Competition authorities in the CEE countries have been given a relatively broad mandate to identify the costs of government policies and actions that restrict competition. Trade policy is an obvious area that should be given priority in this connection. Competition offices have two ways of 'internalizing' trade policy. The first is to oppose trade policies that excessively harm competition on the domestic market; the second is to countervail the anticompetitive effect of trade policy on an *ex post* basis. The first, 'direct' approach has been actively pursued by a number of the CEE competition offices. In this they compare well to competition offices in OECD countries. By commenting on or opposing suggested or existing trade policies, the competition offices ensure that the economy-wide implications of sectoral policies/lobbying are recognized and discussed. The main power of competition offices is, however, of an *ex post* nature. Active enforcement, with guidelines that clearly specify that trade policy will be an important consideration in the implementing competition laws, will help bolster the effectiveness of *ex ante* opposition to policy proposals that restrict access to markets.

A number of actions are identified through which competition law enforcement might be strengthened and be made even more sensitive to trade policy. The legislative possibility for antitrust agencies in the CEE countries to act *ex officio* does not appear to have been fully exploited, although this may largely be the result of the process of the transition towards private ownership and a market

economy. The development of detailed guidelines would help both reduce uncertainty regarding the priorities given by the competition authorities to types of competition-reducing practices, and clarify what practices will not be pursued. One common denominator in the legislation of all CEE countries is the wide discretion that the agencies entrusted with the enforcement of competition laws enjoy. This can have a negative side, in the sense that a number of desirable *per se* prohibitions simply do not exist. An offsetting, positive counterpart is that if discretion is exercised in a pro-competition way, the "jurisprudence" created in this field could further promote the goals of the competition laws. Incorporation of the trade policy stance pertaining to an industry should explicitly be taken into account when defining the relevant market in the enforcement of antitrust. Guidelines to this effect should also be published. Whenever market shares are defined as a threshold (i.e. in the definition of dominant positions) they should be linked to market contestability considerations—i.e., explicit public recognition that what matters is market power. It would prove very useful for the evolution of the competition philosophy in the CEE countries, and at the same time enhance transparency, if competent agencies were to publish the reasoning underlying their decisions.

Despite their agreement to adopt EU-compatible competition disciplines, and despite the fact that free trade and freedom of investment will be achieved within ten years, there is no provision in the Europe Agreements specifying that antidumping will be phased out. Continued threats of contingent protection on the part of the EU implies that CEEC firms will face different standards than their EU competitors. EU firms will be permitted to engage in price discrimination or sell below cost on the EU market, whereas CEE firms will be constrained in pursuing such a strategy by the existence of EU antidumping procedures. A review of experience that has been obtained with attempts to abolish antidumping in the context of regional integration agreements suggests that there are at least three necessary conditions for the abolition of contingent protection: (1) free trade and freedom of investment; (2) disciplines on the ability of governments to assist firms and industries located on their territory; and (3) the existence and enforcement of competition (antitrust) legislation. Although these conditions will to a very great extent be satisfied for intra EU-CEE flows, the antidumping option was retained.

An avenue that could be further explored during the transition phase towards full implementation of the Europe Agreements is to establish a link between antidumping and antitrust in instances where CEE countries are facing antidumping threats or actions on the part of the EU. The EC Commission could be asked to apply competition policy criteria in antidumping investigations against products originating in CEE countries, ensuring that there is a threat to competition, not just a threat to an EU competitor. This could be sought on an informal basis during the transitional period. Clearly, the first best strategy for CEE countries is to seek the elimination of antidumping once the Europe Agreements have been fully implemented. If it proves to be impossible to obtain agreement to phase out antidumping, a second-best policy could be to formalize the link between competition law enforcement and antidumping investigations. More generally, since the CEE countries have adopted legislation comparable to that of the EU in the competition field, one can assume that if they enforce their competition laws vigorously, EU-consistent minimum standards will be respected. This may effectively raise the threshold for EU import-competing industries seeking antidumping relief. Vigorous enforcement of competition disciplines in service industries, especially distribution-related, may further help reduce the potential for EU firms to seek contingent protection.

I. Introduction

Six Central and Eastern European (CEE) countries--Bulgaria, the Czech Republic, Hungary, Poland, Romania, and the Slovak Republic--have negotiated far-reaching Association Agreements with the European Union (EU), so-called Europe Agreements. These Agreements will result in free trade in goods, and include commitments by the CEE countries to adopt many of the disciplines of the Treaty of Rome. This paper focuses on one aspect of the Europe Agreements: competition policy. It does so from the perspective of international trade policy, and from the perspective of the CEE countries. The primary goal of the paper is to explore possible institutional mechanisms that could be implemented by CEE governments with a view to increasing the sensitivity of competition law enforcement to trade and investment policy.

The plan of the paper is as follows. We start in Section II with a brief general discussion of the linkages between trade and competition policies. This is followed by a short review of the current state of knowledge regarding 'best practices' in the area of competition policy and the experience of market economies in implementing such policies. Section III summarizes the requirements of the Europe Agreements in the area of competition policy. Section IV provides an overview of existing competition legislation and institutions in the six CEE countries, drawing upon a more detailed country-by-country summary of current laws contained in Appendix 2. Almost all the CEE countries have passed competition legislation and allocated the responsibility for enforcing their competition rules. They have received substantial technical assistance from OECD members in this connection.¹ Section V discusses a number of institutional options that would allow competition aspects of trade policy decisions to be taken into consideration by administering authorities and governments. Three situations are distinguished: (1) the transitional period before the entry into force of the Europe Agreement; (2) the period during which the Europe Agreement applies; and (3) eventual accession to the EU. Section VI concludes.

II. Trade and Competition Policies: Basic Issues

National competition policy can be defined as the set of rules and disciplines maintained by governments relating either to agreements between firms that restrict competition or to the abuse of a dominant position (including attempts to create a dominant position through merger). The underlying objective of competition policy in most jurisdictions tends to be efficient resource allocation, and thereby

¹ For example, the Antitrust Division of the United States Justice Department and the Federal Trade Commission received a \$7.2 million grant from USAID to provide technical assistance to the six CEECs in 1991 (BNA, Antitrust and Trade Regulation Report, May 30, 1991, no. 1518, p. 761). Contacts between the CEE countries and the EC Commission (DG-IV), EU Member State enforcement agencies and the OECD Secretariat have been intense.

the maximization of national welfare.² Most competition laws attempt to attain this objective by prohibiting the abuse of dominant positions (either through prohibition or through regulation), and forbidding various kinds of competition-restricting agreements between competitors. The focus of competition laws is on competition, reflecting the belief—which is extensively supported by empirical evidence—that vigorous competition is frequently the best way to foster economic efficiency. Many jurisdictions recognize that specific agreements between firms that may reduce competition could be efficiency enhancing, and make allowance for such agreements. However, the burden of proof in such instances is usually upon the participants in such arrangements.

The objectives underlying trade policy contrast starkly with those of competition laws. Governments pursue trade policies for a variety of reasons, including as a means to raise revenue, to protect specific industries (whether 'infant', 'senile' or other), to shift the terms of trade, to attain certain foreign policy or security goals, or simply to restrict the consumption of specific goods. Whatever the underlying objective, an active trade policy redistributes income between segments of the population by protecting specific industries and the factors of production employed there, and usually does so in an inefficient manner. Trade policy is consequently often inconsistent with the objectives underlying competition policy. The way this inconsistency is frequently put is that competition law aims at protecting *competition* (and thus economic efficiency), while trade policy aims at protecting *competitors* (or factors of production). The issue facing governments is to ensure that competition prevails. This requires the design of institutional mechanisms that allow governments to explicitly consider the competition implications of particular trade or investment policies.

The more restrictive the trade/investment regime, the more important competition policy becomes to reduce the inevitable negative welfare consequences of the reduction in competition that results from restricting the contestability of markets. From an economic (efficiency) perspective, using competition policy to attempt to offset the competitive distortions created by an active trade policy is of course an exercise in the second best, and may not be welfare enhancing. A preferable policy is to minimize the extent to which trade policy reduces the contestability of markets in the first place. Thus, a liberal external policy stance is a cheap and effective competition policy. Competition from imports is a very important source of discipline upon the behavior of firms operating in a market.³ This is the

² However, other objectives may also be pursued. Thus, for example, the competition law of the United Kingdom contains a broadly defined public interest objective that, among other things, allows for 'maintaining and promoting the balanced distribution of industry and employment' (Hay, 1993, p.3).

³ This is one of the basic principles of international trade theory, one that applies to both the traditional setting of competitive markets and in the more recent literature that allows for imperfect competition. For empirical studies confirming the role of import competition as a source of market discipline in imperfectly competitive markets (reducing price-cost margins), see Levinsohn (1993) and Jacquemin and Sapir (1988).

case in particular for the CEE countries, given the highly concentrated industrial structures inherited from the past. However, while a free trade stance greatly reduces the scope of the task facing competition authorities, it does not imply that the need for competition rules disappear. Many products are non-tradable (e.g., many services), or, even if tradable, competition may be limited to local markets for other reasons.⁴ Free trade must therefore be complemented by the freedom of entry, including the possibility to contest markets through foreign direct investment. Even then, certain products may be produced by (natural) monopolies, by firms with global market power, or by firms where natural or 'unnatural' (government-made) barriers to entry restrict contestability. And, the more open are markets to foreign products, the greater the potential vulnerability to anti-competitive practices of foreign monopolists or cartels. In all such cases competition rules should apply.

In instances where sovereign states have concluded economic integration agreements, the reach of competition policy may be extended to include the behavior of governments as well as firms. Thus, in the case of the EU, competition policy disciplines also pertain to public monopolies and state-owned enterprises, and governments are restricted in their ability to subsidize firms located in their territory insofar as this affects trade between Member States. It is important to realize that in the EU context—where the ultimate goal is the realization of a common market—competition disciplines are intended not only to enhance efficiency, but also serve as another instrument through which to attain the integration objective. The goal is to ensure that the removal of trade barriers is not nullified by actions on the part of firms or governments to maintain or recreate market segmentation. The 'trade effect' criterion included in the Treaty of Rome's competition policy disciplines implies that in the EU context competition rules are a *complement* to the internal trade policy of the EU, i.e., free trade.⁵

The CEE countries have signed far-reaching association agreements with the EU that imply a free trade, free foreign direct investment stance vis-a-vis the EU will exist once the various transitional periods have ended. Trade agreements have also been negotiated with the EFTA countries, and between the CEE countries themselves (the Central European Free Trade Association). While the associated trade liberalization reduces the need for an active competition policy stance, it by no means makes competition law enforcement redundant. For one, there is the transition period during which trade or investment barriers remain high for some sectors. More importantly, account needs to be taken of the policy stance vis-a-vis the rest of the world, of the various safeguard mechanisms built into the EAs that allow for

⁴ Retail distribution is an often mentioned example in this connection.

⁵ See, e.g., Ehlermann (1992) or Wheatherill and Beaumont (1993). In the case of the EU, competition policy acts as a discipline on firms that operate in an environment of free trade. Thus, in principle no conflict arises between competition and trade policy in the EU context, there no longer being a trade policy affecting intra-area transactions.

possible intervention to support domestic industries, of the fact that some markets are difficult to contest by foreign firms, and of the actions of other parts of the government that may restrain competition.

Implementing Institutions, Criteria and Procedures

The presumption underlying competition policies is generally that vigorous competition between firms in an industry will foster efficiency. However, competition *per se* will not necessarily ensure efficient outcomes. Much depends on the kind of competition that firms engage in, or alternatively, on the objectives underlying agreements between firms in an industry that reduce competition between them. Certain types of agreements between firms may be welfare enhancing for the nation as a whole. Thus, agreements to form an export cartel may allow a domestic industry to raise prices on export markets and improve the country's terms of trade and welfare. Cooperation between firms may also lead to dynamic benefits, e.g., research joint ventures or agreements on the development/use of common standards allowing positive network externalities to be realized. Most competition laws recognize that some agreements between competitors that appear to be competition-reducing may in fact not reduce competition, or, even if limiting competition, may be welfare increasing. As a result a distinction is generally made between *per se* rules and *conditional prohibitions*. The former unconditionally prohibit certain forms of behavior (agreements). The latter prohibit certain types of cooperation (collusion) in principle, but may permit their existence if the firm(s) involved can convince the competition authorities that the agreement is welfare enhancing.⁶ Space constraints prohibit any detailed discussion of competition law theory and principles.⁷ What follows is limited to a number of issues that are of particular significance for the CEE countries.

A first issue is to determine what types of agreements/behavior should be subject to *per se* rules. There are only a limited number of competition-reducing agreements between firms that can be rejected on an *a priori* basis (assuming the objective is efficiency), of which price fixing and agreements with similar effects are the most important.⁸ Theory suggests these types of arrangements should be subject to *per se* prohibition, and in most jurisdictions they are. A strong political economy argument

⁶ In practice, two approaches can be followed in this regard, of which the rule of reason (pursued in the U.S.) is one. The rule of reason is based on a case-by-case analysis of the effects of specific situations. The other approach (followed by the EU) is to exempt either specific agreements (along U.S. lines) or *generic* types of cooperative ventures.

⁷ The literature on competition policy, both economic and legal, is huge. See Hay (1993) for a survey of current economic thinking; Boner and Krueger (1991) for a summary of the practices of ten countries as well as the EU.

⁸ Examples of the latter include production (output) sharing, market allocation, exclusionary practices and the exchange of information between competitors on variables such as costs and output.

can be made for a restrictive approach to *per se* rules in the CEE context. Firms need to have the maximum amount of flexibility to compete in whatever way they see appropriate to their situation. Insofar as there is some uncertainty regarding the legal and institutional environment in an economy in transition, firms may need to be 'creative' in terms of their contractual arrangements.

The majority of countries with active antitrust enforcement identify three types of practices that *may* be prohibited: competition-reducing practices or arrangements between firms; the abuse of a dominant position; and the establishment of a dominant position. Important in this context are not so much the specific legislated rules, but the criteria that apply when implementing the law. For example, in the context of an investigation into abuse of a dominant position, the criteria include those for defining the product and geographical scope of the market, the threshold of necessary market power, and the methods used to determine the feasibility of entry. Experience reveals that the effect and operation of competition laws very much depends on the implementing rules that are applied.

A final issue relates to the design of the institutional mechanisms for enforcing competition rules. This includes the allocation of responsibility for enforcing competition law to an entity, its relationship to the government and legislature, its powers of investigation and sanction, its financing and staffing, and the mechanisms to ensure transparency and consistency, including the availability of an oversight or appeals body (the courts or a tribunal).

The approaches taken by OECD countries towards competition law and policy are quite diverse, reflecting in part differences in economic philosophy, and in part differences in size and openness. A number of lessons can be drawn from both economic theory and experience:⁹

- The focus of the rules and enforcement efforts should be on all sectors, including services, and should center on the *effects* of agreements between firms, not on their form. The basis for intervening should be market power, not dominance (as measured, e.g., by market shares). A key criterion in investigating whether an arrangement between firms or an action of a firm violates competition rules should be the ease of entry into, and exit from, the industry. Contestability is what matters.

- The number of *per se* prohibitions should be small and focus on horizontal, price-fixing arrangements. Disciplines on vertical restraints should be subject to a well-defined contestability constraint, i.e., a necessary condition for pursuing vertical restraints is significant entry barriers.

⁹ Again, what follows draws upon a large literature. For recent, much more comprehensive discussions of competition rules and experience, see Boner and Krueger (1991), Hay (1993), Neven et al (1993), and the annual reports of the OECD Committee on Competition Law and Policy.

- Competition rules should provide *ex post* disciplines on trade policy-created or supported abuse of market power, ideally including a mandate for competition authorities to recommend the removal/reduction of trade barriers and to be consulted in the trade policy formation process.

- The criteria that are used in investigations should be spelled out clearly in guidelines. *De minimis* rules should be included. Firms should face as little uncertainty regarding potential liability as is possible. Detailed reports of investigations should be published. Procedures should be transparent.

- Civil parties should be able to sue persons (natural and legal) deemed to engage in behavior violating the competition rules. Enforcement authorities should have the power to levy substantial fines and award damages.

- Both investigating procedures and substantive reasoning should be subject to review by an appeals body that is independent of the enforcement authority.

- An independent body should exist with the mandate to analyze and publicize the costs and benefits to the economy of government created or maintained barriers to entry in individual industries.

III. The Europe Agreements' Competition Rules

The Europe Agreements (EAs) foresee in the application of the basic competition rules of the EU by the associated countries to practices that affect trade between the EU and each Central and East European country. The rules relate to agreements between firms restricting competition, abuse of dominant position, the behavior of public undertakings (state-owned firms) and competition-distorting state aids (Articles 85, 86, 90 and 92 of the EEC Treaty respectively). Thus, competition policy is defined widely to include the behavior of governments as well as of firms. Implementing rules are to be adopted by the Association Council on a consensus basis within three years of the entry into force of the Agreements.¹⁰

Each Europe Agreement must be ratified by 13 national parliaments plus the European Parliament—because the agreements include issues on which the Commission does not have exclusive competence. So as to accelerate the implementation of the trade and trade-related provisions of the EAs, interim agreements were signed that entered into force on March 1, 1992 for the so-called Visegrad four (Hungary, Poland, and the Czech and Slovak Republics), May 1, 1993 for Romania and December 31,

¹⁰ For a general review of relations between the EU and the CEECs, see Kennedy and Webb (1993). Pohl and Sersa (1993) provide a summary of the EAs, and Mastropasqua and Rolli (1994) analyze the economic impact of the trade components of the agreements.

1993 for Bulgaria. They will remain in force until the EAs are ratified.¹¹ As competition policy is a EU competence, it is covered by the interim agreements. The interim agreements revise the language of the EAs as regards the determination of implementing rules by requiring that these be adopted by decision within three years of the entry into force of the interim agreements by the Joint Committee (established under the earlier Cooperation Agreements that had been negotiated with Hungary, Poland and the Czech and Slovak Republics). Sub-committees for competition have been established under auspices of the Joint Committees. It has been agreed that cooperation between the EU and CEE antitrust authorities is to follow the 1986 OECD Council Recommendation dealing with cooperation on restrictive business practices affecting international trade, and Article V of the agreement between the EU and the U.S. regarding the application of their competition laws ('positive comity').¹²

The notion of 'positive comity' appears alongside 'traditional' comity in the September 1991 cooperation agreement in antitrust between the EU and the U.S.¹³ According to the traditional comity principle, sovereign states will consider important interests of other states when exercising their own jurisdiction (Art. VI of the agreement).¹⁴ 'Positive comity' shifts the initiative to the state whose interests are affected, which is given the legal option of requesting another state to initiate appropriate enforcement proceedings if this could address the complaining country's concerns (Art. V of the agreement). While it clearly goes beyond the traditional principle that is embodied in the OECD Recommendations, the ultimate decision remains at the discretion of the state asked to act. As discussed further below, the notion of positive comity could be exploited further in the trade-competition policy context.¹⁵

¹¹ As of end-1993 only the agreements with Poland and Hungary had been ratified. The respective Association Councils met in early March 1994 for the first time.

¹² OECD (1994, pp. 14-15). During 1993 several meetings took place between CEEC officials and the EC Commission where issues relating to the implementation of competition policy were discussed. These meetings should facilitate agreement on formal implementation rules by the Joint Committees. Presumably these will simply be adopted by the Association Council once the relevant EAs have been ratified. DG-IV of the Commission has interacted with the CEECs with a view to harmonizing antitrust policies (not laws).

¹³ See, e.g., Ham (1993) for a discussion.

¹⁴ The 1986 OECD Recommendation, which replaced the 1979 Recommendation and purports to strengthen international cooperation in this field, encourages OECD members to give effect to the principle of traditional comity.

¹⁵ France has challenged the Commission's competence to conclude this agreement, which has been characterized as administrative by the Commission and thus falling within its sphere of competence. The outcome of the case is still pending, although the Advocate General has already pronounced in favor of France's arguments. See Case C-327/91, French Republic vs. Commission. Even if France wins its case before the European Court of Justice, the 'positive comity' principle can still apply in the EA context as these have been legally concluded by the competent EC organs.

Appendix 1 reproduces the relevant Articles pertaining to competition policy from the EA with Hungary. The other EAs contain virtually identical language.¹⁶ As far as disciplines on enterprise behavior are concerned, the basic rules of the Treaty of Rome have been included. That is, practices that restrict or distort competition and abuses of dominant positions (in either the EU or the relevant CEE country); insofar as they affect trade, are to be assessed on the basis of criteria arising from the application of Articles 85 and 86 EEC. This wording implies that the case law that has been built up in the last 45 years in the EU applies. Art. 85 EEC prohibits agreements and concerted practices—both tacit and explicit, whether enforceable or not—that restrict or distort competition in the common market and may affect trade between EU member states. Both horizontal and vertical restraints are covered. The EU applies a version of the ‘effects’ doctrine: the focus is on distortions of competition within the community, independent of the national origin of the firms involved. Implementation of the conduct within the EU is necessary to assert jurisdiction.¹⁷ Effects on trade may be potential, indirect as well as direct, and involve stimulating as well as restricting trade (e.g., through the use of cross-subsidization). A *de minimis* rule has been established by the EC Commission under which firms with relevant market shares below 5 percent and aggregate annual turnover of less than ECU 200 million are exempted from the reach of competition disciplines. Art. 85:3 EEC offers the possibility of exemptions from the general prohibition on competition distorting agreements if it can be shown that the agreement is in the public interest.¹⁸ Certain types of agreements have been granted ‘block’ exemptions, including those relating to standardization and R&D cooperation, exclusive distribution (as long as parallel imports remain feasible), exclusive purchasing and automobile distribution and servicing. The Commission can self-initiate investigations or respond to complaints and has the power to demand information and levy fines for non-compliance.

Article 86 EEC prohibits abuse of a dominant position. Dominance is determined on the basis of the relevant product and geographic markets. Dominance may relate to the common market as a whole or “a substantial part thereof.” No quantitative criteria are mentioned in Art. 86 regarding the interpretation of substantial, or the market share (or other indicators) required for dominance. Abuse is also left undefined. Art. 86 contains an illustrative list of abuses, including unfair trading, price discrimination, tie-ins or bundling, and restricting output or access to markets.

¹⁶ The agreements do have minor differences as they were negotiated independently.

¹⁷ The “pure” effects doctrine is therefore not accepted. See van Gerven (1989).

¹⁸ Necessary conditions are: (1) that the agreement contributes to improving the production or distribution of goods or to promoting technological or economic progress, while allowing consumers a fair share of the resulting benefit; (2) the agreement is indispensable to achieve this benefit; and (3) it does not eliminate competition in respect of a substantial part of the industry involved.

There are some key differences between the rules that apply under the EAs and those that apply to EU or EEA Member States. First, the EAs do not reproduce Art.85:3 EEC and thus do not make any allowance for the granting of exemptions. Presumably this will be one of the matters to be addressed by the Association Council/Joint Committee in developing implementation rules. Until then, exemptions granted by national CEE competition offices do not have to be recognized by the EU (see also Bourgeois, 1993). Second, the EAs do not contain disciplines relating to mergers, and the Commission will presumably apply the relevant regulation unilaterally.¹⁹ Third, they do not spell out what bodies are responsible for enforcement of EA disciplines, the criteria for allocating responsibility, and the options for appeal. These are matters that are left for the Association Council/Joint Committee to determine.

Public undertakings and undertakings to which special or exclusive rights have been granted (e.g., monopolies), are to be subject to the principles of Article 90 EEC within three years of the entry into force of the association agreement. Art. 90 requires nondiscrimination on the basis of nationality and behavior consistent with the other competition principles and rules of the EU, including Articles 85-86 and 92, insofar as the application of these rules do not impede the realization of the tasks assigned to the public undertaking. State monopolies of a commercial character are to be adjusted within five years to ensure nondiscrimination regarding the conditions under which goods are procured and marketed between EU and CEE country nationals (this is analogous to Article 37 EEC).

Turning to disciplines on state aids, until implementing rules are adopted, GATT rules with respect to countervailing of subsidies will apply. State-aid, compatible with EU rules for disadvantaged regions (Article 92.3(a) Treaty of Rome), can be applied to the entire territories of the associated states during the first five years. Such regional aid may be given by EU governments to regions in their countries with per capita incomes that are substantially below average, or to areas where there is significant unemployment. The low level of per capita incomes in the Central and East European countries in comparison to those of EU states should ensure that non-industry-specific state aids will be unconstrained in the medium term. The agreements also provide for enhanced transparency of state aids. The adequacy of these provisions are to be determined by the Association Council. State aids to agriculture and fisheries are excluded from competition policy disciplines, and separate rules are to be implemented by the Association Council within three years for the steel sector. The latter are to be based

¹⁹ The 1989 merger regulation gives the Commission the right to vet mergers with a Community dimension for their impact on competition. Mergers affected are those where the firms involved have a global turnover of at least ECU 5 billion, the aggregate Community turnover of at least two of the firms is above ECU 250 million each, and at least two firms have less than two-thirds of their turnover in the same EU member state.

upon Articles 65-66 of the Treaty of Paris (European Coal and Steel Community, ECSC), and make allowance for state aids permitted under ECSC auspices.

IV. Competition Laws and Institutions in the CEE countries

Five of the six CEE countries currently have competition legislation in force: Bulgaria, the Czech Republic, Hungary, Poland and the Slovak Republic.²⁰ To a greater or lesser extent CEE laws are modeled on the EU's approach to competition policy, distinguishing between collusive arrangements (Article 85), abuse of dominant positions (Article 86), and rules for mergers. All the laws apply to goods and service markets (although some services are excluded in some jurisdictions), all appear to follow an 'effects doctrine' approach, and all are based on the conditional prohibition model. While many types of collusive arrangements appear to be prohibited on a *per se* basis, in most cases exemptions are possible. Although superficially similar, there are substantial differences between the various laws. The discussion that follows draws upon the more detailed overview in Appendix 2.²¹ After the breakup of the Czech and Slovak Federal Republic, the 1991 Federal competition law continued to be enforced in both countries. The Czech Republic adopted an amendment to the 1991 Federal law in November 1993, and a revised law is expected to be submitted to the Slovak Parliament in mid-1994. Until the Slovak Parliament adopts the draft legislation, the Slovak Antimonopoly Office will apply the 1991 Czech and Slovak Federal law.

Substantive disciplines

All the CEE laws prohibit certain types of anti-competitive practices on a conditional basis. The Czech and Slovak law is the only one to contain an unconditional *per se* prohibition on arrangements that violate legal norms of ethical behavior and on contracts that obstruct "in a substantial way economic competition in a market." It provides an illustrative list of agreements that are prohibited (void) unless an exemption is granted by the competition authorities. Exemptions are automatic for an exhaustive list of types of prohibited agreements if the authority makes no objection within two months of the receipt

²⁰ In Romania work is ongoing on the drafting of an antitrust law. At the time of writing the only laws to address some competition-related issues are the 1991 Law on Unfair Competition and the 1990 Law No. 15 concerning restructuring of state economic units. The former includes some principles of free competition; the latter prohibits (on a *per se* basis) certain practices, including price fixing (Chapter V, Association and Free Competition).

²¹ Gray (1993) and Mastalir (1993) provide complementary summaries of the antitrust legislation in the CEECs.

of the request for an exemption.²² For other types of agreements explicit exemptions must be granted, the criterion being that this is in the public interest, in turn defined as supporting technological or economic development. The November 1993 Czech amendment to the Federal law gives the Ministry of Economic Competition the right to grant block exemptions along EEC 85:3 lines. The Hungarian law contains a much shorter illustrative list of prohibited practices, relying instead on a general rule: agreements are not to result in a restriction of economic competition. Exemptions can be granted if an agreement is aimed at stopping the "abuse of economic superiority," or is "of minor significance (defined as the firms involved having less than 10 percent of the relevant market), or if the restriction does not exceed what is required to achieve "economically justifiable common goals" and the resulting economic benefits outweigh the costs. The Office of Economic Competition may present an appeal to the Constitutional Court to express criticism of effective laws and regulations. To date, this option has not been exercised (OECD, 1993c).

The Polish law has an *exhaustive* rather than illustrative list of prohibited 'monopolistic practices'. Exemptions may be granted if the agreements do not significantly restrain competition and are "necessary to conduct an economic activity." The Bulgarian law does not list specific collusive arrangements, simply containing a sweeping prohibition on contracts that restrict the choice of a party to the agreement or consumers, unless these are not injurious to consumers. Exemptions can be requested.

All the laws follow the EU approach of prohibiting the abuse of dominant positions. In contrast to Article 86 EEC, the CEE countries have specified quantitative criteria defining when a position of dominance exists. The Czech criterion is a market share of 30 percent or more; in Poland it is 40 percent; in Hungary 30 percent (or 50 percent for the largest 3 firms); and in Bulgaria it is 35 percent. Firms meeting the criterion are required to notify this to the antitrust authorities. The Czech and Slovak, Hungarian and Polish laws contain illustrative lists of abuses of dominant positions, while the Bulgarian one has an exhaustive list.

Turning to merger disciplines, all the laws require firms to notify mergers that result in a market share exceeding a target level. These levels are those that comprise dominance, i.e., a market share of at least 30, 40, 30, and 35 percent, respectively, for the Czech and Slovak Republics, Poland, Hungary and Bulgaria. However, Hungary also requires all mergers where the joint turnover is at least 10 billion forint (some \$100 million) to be notified, even if the market share threshold is not exceeded. More generally, both the Czech and Slovak and Hungarian laws allow mergers that exceed the threshold

²² The agreements concerned are uniform application of conditions of trade; rationalization of economic activity, including specialization agreements; non-discriminatory rebates; and all instances where the market share of the firms is below 30 percent of the relevant market.

to be approved if the resulting economic benefits offset the costs. However, how these terms are defined remains unclear, and usually it will be up to the firm(s) involved to present a case.²³ The Polish and Bulgarian laws do not mention any criteria at all for approving mergers that exceed the market share threshold. In the Czech and Slovak case mergers are automatically approved if no objection is made within three months of notification. In Poland and Hungary this period is two months, and in Bulgaria only one month. Extensions of these time limits are possible.

It is noteworthy that the Czech and Slovak law gives the competition authorities the right to comment on privatization proposals. The law requires the government to analyze the market conditions that are likely to result from a privatization proposal, and ensure that privatization will either result in the abolition of a monopoly if one exists, or not result in a monopoly if one does not exist. The Polish law contains a similar provision that has been actively applied. Over 1,900 'structural decisions' (relating to privatization and transformation of firms) were made in the 1990-92 period by the Polish Antimonopoly Office, of which 89 percent were approved (OECD, 1993a, p. 18). Hungary and Bulgaria do not give their competition offices similar (transitional) powers.

Procedural and institutional provisions

In all cases a separate enforcement agency has been established. The powers of the agency vary substantially across CEE countries. The Bulgarian Commission for Protection of Competition is the weakest. All its members are appointed by the National Assembly for a 5 year period and can presumably be fired by the same. It cannot impose fines in instances where it finds the law to be violated, having to go through the civil courts to do so. Its main remedy is the right to suggest to the Council of Ministers that it impose mandatory minimum or maximum prices for entities with a dominant position. The head of the Czech competition office is a member of the Government (with the title of Minister of Economic Competition). The Czech antitrust office has the power to levy fines up to 10 percent of the firm's net turnover or equal to the profits garnered as a result of violating the law. In practice, however, some competition policy decisions are apparently taken in cabinet meetings. In Poland, two competition bodies were created: an office in charge of investigations, and a court in which decisions may be appealed. The head of the Polish Antimonopoly Office is appointed by the Prime Minister. Fines may be imposed by the office up to 15 percent of after-tax earnings of the firms.

²³ Arguments that have been used in the Czech context by *foreign* firms that merged with or acquired Czech enterprises to demonstrate that net benefits were positive to the economy include: (i) provision of investment necessary for reconstruction/modernization of plants; (ii) enhancing exports; (iii) improving product quality and competitiveness; (iv) preserving employment; (v) introducing modern management techniques; and (vi) facilitating transfers of technology.

Alternatively, firms may be required to reduce prices and firms with a dominant position may be required to divest parts of their operations.

The head of the Hungarian Office of Economic Competition is appointed by the President for 6 years on the recommendation of the Prime Minister, and can only be fired "if unfit for office on a lasting basis." The office is funded from the State budget, and is answerable to the Hungarian Parliament. It can impose fines ranging between 30 and 200 percent of the profits resulting from the violation of the law. The office has three parts: a Board of Experts responsible for investigations, a Competition Council which acts as an arbitration (administrative) court, and a Department of Competition Policy that is responsible for research and policy advice to Parliament.²⁴ The Council does not have competence to judge violations of 'unfair competition' (Chapter 1 of the Act), instead having to file suit in civil court. The Slovak Antimonopoly Office is a central government body. Its Chairman is appointed and recalled by the Government. Decisions of the Office can be appealed before the Supreme Court.

The antitrust agencies in the CEE countries are all required to publish decisions. The Czech, Hungarian and Bulgarian laws allow for hearings to be held, but do not require it. The Hungarian enforcement agency is subject to the strictest time limits for investigations.²⁵ Decisions by antitrust offices can be appealed in all the jurisdictions. In Poland appeals go to the special court created for this purpose; in the other three countries appeals go through the civil courts.

The number of cases brought in the Czech Republic, Hungary, Poland and the Slovak Republic have been quite significant. In 1992, 255 cases were handled by the Hungarian Office of Economic Competition; in the Czech Republic out of 1,200 complaints filed in 1992, the Czech Office opened some 100 investigations. In Poland, 113 anti-monopoly investigations were launched in 1992, the total for 1990-1992 being some 300 (OECD, 1994). The Slovak Antimonopoly office investigated 158 and 164 cases in 1991 and 1992, respectively, and saw its case load rise to 274 cases in 1993.²⁶

Evaluation

A commonality of the CEE laws is that implementing authorities are given a great deal of discretion as far as interpretation of terms is concerned. Much will depend on the case law that emerges from experience and the guidelines that are developed by the competition offices. Although the leeway

²⁴ Pogacsas and Stadler (1993).

²⁵ Cartel, merger and all other investigations must be concluded within 45, 90 and 60 days, respectively. Maximum extensions allowed for each category are 45, 180, and 60 days (Pogacsas and Stadler, 1993).

²⁶ Financial Times Business Information, *Business Law Brief*, DIALOG database, October 1992, and private correspondence with M. Banas.

given to administering authorities is substantial, this also provides an opportunity to adopt implementing regulations that increase their ability to influence trade/FDI policy stances (see below). As it stands, however, firms operating in the CEE countries will face a substantial amount of uncertainty regarding the precise nature of the rules. Only the Czech and Hungarian laws explicitly make use of *de minimis* provisions (5 and 10 percent share of the relevant market, respectively). Greater use of the concepts of horizontal and vertical restraints would help increase transparency and certainty. Only the Hungarian law makes a clear distinction along these lines, only prohibiting those vertical restraints that involve firms with a dominant position.²⁷ The reliance on explicit market share thresholds as the main criterion for dominance distinguishes the CEE laws from Article 86 EEC. While apparently a straightforward indicator that should reduce uncertainty for firms, it may be difficult to monitor for firms. Market share is also not a sufficient indicator of dominance. Much will depend on the definition of the relevant antitrust market and the extent to which entry barriers are found to exist, issues that is generally left open in the various laws. Here the trade policy stance of each country will be important.

The Hungarian office has the greatest independence from the political system, followed by the Polish and Czech offices. In general, it appears that greater emphasis could be put upon procedural requirements and transparency. Hearings are neither mandatory nor necessarily public. Decisions *and* arguments/reasoning/analysis should be subject to a publication requirement. There is a strong political economy argument to be made for maximizing transparency, as this both increases certainty/knowledge of firms regarding what is allowed and what is not, and reduces the incentive to engage in rent-seeking.

V. Competition Rules and Trade Policy: Issues and Options

In the context of the EAs, four distinct time periods can be distinguished for each of the CEE countries that are relevant in terms of the implementation of competition rules: (1) the period up to the entry into force of the competition articles of the Interim Agreement; (2) the period until the entry into force of the EA; (3) the phase during which the EA applies; and (4) the phase during which the country has become a member of the EU.

The pre-Europe Agreement phase

Each CEE country in principle has only three years after the implementation of the Interim Agreements in which it is unconstrained regarding its competition policies. Despite EA obligations, substantial discretion remains for national authorities regarding the implementation and enforcement of

²⁷ Poland and the Slovak Republic have drafts of new legislation that makes this distinction, while the November 1993 Czech law does not. However, in applying the law, the Czech Ministry of Economic Competition does differentiate between vertical and horizontal agreements.

its competition policy. In this section EA obligations are assumed away. The question of EA compatibility is addressed in the next sub-section (and in Appendix 2). Taking into account the fact that the majority of the CEE countries have competition laws and enforcement bodies, policy issues that arise include: (1) whether the competition rules in force are adequate or appropriate; (2) at the level of implementation, what should be given priority by enforcement authorities, given the substantial amount of discretion implied by the wording of their respective laws; and (3) whether the enforcement agencies have sufficient resources, power, and political independence to do their job. In this Section the focus will be primarily on the second question. We only have limited information and knowledge on the last question. We simply assume, perhaps heroically, that there are no major problems in this connection. If there are, they should be given priority.²⁸ As to the first question, many of the CEECs are in the process of amending their laws (see Appendix 2), in part with a view to meeting the EA obligations. This is not the place for a detailed discussion of the specific changes to each of the laws that might be considered by the respective governments. Given the wide scope for discretion that is inherent in the enforcement of competition law, decisions that are internal to the implementing bureaucracy will to a great extent determine the effective impact of the laws. What is of key importance then is to enhance the transparency of the process, and minimize to the greatest extent possible any uncertainty market participants might have regarding the criteria that are employed by the competition authorities.

What might be done in addition to what is already being done by competition offices with a view to reducing the scope for protection-seeking? First, and foremost, it appears useful to clarify the potential scope of antitrust for local firms by defining terms and criteria used in investigations. Given the great latitude that enforcement agencies have in the CEE countries as regards interpretation of the law and the application of criteria, very much can be done in this manner to reduce uncertainty and focus the attention of the agency in particular directions. Efforts should be made to specify clearly what practices are *de facto* prohibited on a *per se* basis, thereby publicly announcing what restraints (and those economic effects or results) that are considered to be most pernicious. Drawing upon the experience of OECD countries, one procedure could be to distinguish vertical from horizontal restraints, and indicate that specific horizontal agreements will be viewed very critically if requests for exemptions are received, while vertical restraints will be regarded as being much less likely to infringe upon competition principles (Willig, 1992). Those jurisdictions that do not have legislated *de minimis* criteria should adopt and publish relatively high thresholds in their implementing procedures. The EU approach of defining block

²⁸ However, the Czech competition office has been held to be understaffed by a Deputy Minister for Competition. BNA, *Antitrust and Trade Regulation Report*, December 24, 1992, no. 1596, p. 787.

exemptions can be emulated.²⁹ This again does not necessarily require formal legislation. As competition offices are responsible for granting exemptions, they can determine the categories of agreements that do not have to be notified. Flassig (1993) has noted that during the transition, firms and consumers that are negatively affected by restrictive business practices may be unwilling to bring cases given their dependence on existing relationships. It is therefore also important that the competition authorities take a lead role, and exploit their mandate to self-initiate.³⁰ Finally, transparency can be further improved by publishing not only decisions but also the underlying analysis and reasoning.

Competition authorities can act as the 'conscience' of the government, recognizing and publicizing the costs to consumers of government policies and actions that restrict competition. Trade policy is one obvious area that should be given priority in this connection, the service sector another. Competition policy offices could consider actively applying antitrust law in the light of maintained trade policies (e.g., accounting for the effect of protection on market structure, concentration, etc.). Much can be done in this connection through appropriate wording of criteria and implementation guidelines within the framework of currently existing legislation. For example, trade policy considerations can be linked to the definition of the relevant antitrust market.³¹ In principle, the more an industry is protected, the narrower could be the definition of the relevant market, thereby reducing the expected profitability of seeking protection, and thus the incentive to lobby for it. In a similar vein, GATT illegal or 'grey-area' measures such as voluntary export restraint and import expansion agreements should be publicly stated to be unenforceable, and subject to competition policy enforcement.³² *De minimis* provisions can also be related to the trade policy stance that affects an industry. The more liberal are market access conditions for foreign firms/products, the higher can be the threshold that is applied.

²⁹ As was done by the Czech Republic in November 1993, and is also envisaged in the draft Slovak law.

³⁰ Polish and Slovak statistics suggest that complaints account for two-thirds of total investigations (OECD, 1994). In Hungary, the majority of the procedures in 1992 started on the basis of applications (236 cases), the Office of Economic Competition using its right to initiate proceedings *ex officio* in only 17 cases (OECD, 1993b). In part this may reflect the wording of the laws and the transition process. As noted by Fornalczyk (1993), the Polish Antimonopoly office was obliged to initiate investigations whenever a complaint was received, and were required to review applications for all mergers/transformations. Resource constraints then "crowded out" *ex officio* actions.

³¹ Authorities have substantial latitude in this connection, as the relevant market is not clearly defined in any of the laws. In most jurisdictions the concept is defined through case law and administrative practice.

³² It can be noted in passing that GATT obligations and disciplines have little impact on the pursuit of domestic competition law, even though in principle the linkages between GATT's trade policy disciplines and domestic competition policies are greater than is commonly thought. See Hoekman and Mavroidis (1994).

Active scrutiny of petitions for contingent protection should also be pursued by competition authorities. Hungary and Poland already have antidumping legislation, while the Czech and Slovak Republics intend to adopt the necessary statutes. Ample experience in the EU and the U.S. has demonstrated that such measures may be very costly to the economy. Antidumping in particular can be used as a tool to substantially reduce competition and enforce collusion. Ideally, no contingent protection should be granted by a government if this would have a substantially negative impact on competition (e.g., strengthen market power or dominance). The decision by the Polish government to give the Antimonopoly Office the responsibility of implementing antidumping investigations is particularly noteworthy. This is laudatory, as it should ensure that competition policy criteria are applied to the firms (industry) applying for protection. Rather than being limited to an *ex post* role, the competition authorities in Poland have an *ex ante* responsibility. Of course, it is important that competition policy criteria are indeed applied, and that *ex post* monitoring remain possible. It is not necessary that competition offices be given the task of applying antidumping actions; what matters is that they are able to vet such actions before they are taken. Poland is unique in this regard. However, the draft Czech antidumping statute also gives a role to the competition authorities. While not given a formal responsibility, the draft statute proposes that the decision to apply an antidumping action be taken by the Government, and not by those administering the statute.³³ As the head of the competition office has Ministerial rank, this at least allows competition concerns to be raised.

The political situation in the CEE countries may be somewhat special in this regard as there may be a perceived conflict between vigorous enforcement of competition law and the transition to a market economy. For example, to attract inward FDI a government may be willing to provide 'guaranteed' markets to inward investors, and do so in a way that conflicts with competition policy principles. As noted by Imrich Flassig,

"Foreign companies participating in mergers often demand conditions for the establishment of joint ventures that they would never dare to expect in their home countries. They look for certain concessions for the protection of their desired markets, such as customs privileges. The foreign partners in joint ventures seem surprised by the reaction of the [Federal Czechoslovak Antitrust] office and by the rights that it has, although in their home countries they would not behave in this way....[A]s a new institution ... we find it quite difficult to devise proper measures for the necessary ... strict adherence to the law. But if we demand too severe terms, we may discourage many foreign investors; that would restrict the creation of a competitive environment, affecting particularly the future relaxation of

³³ *East-west*, No. 558, October 28, 1993, p. 3.

protectionist measures in relation with the EC (Flassig, 1993, pp. 73-74; see also Fornalczyk, 1993).³⁴

Notwithstanding active participation in the policy formation process, CEE antitrust offices have had only limited influence in opposing competition-reducing policies, be they restructuring/privatization-related or trade-related. Thus, in the case of Poland, despite attempts by the Antimonopoly Office to prevent excessive concentration in privatized industries, often industrial or social policy considerations dominated competition concerns (OECD, 1994, p. 13). Indeed, the Polish Antimonopoly Office supported substantial reductions in import tariffs for industries that were highly concentrated (monopolized). The resulting adjustment pressures and deterioration of the current account were such that tariffs were subsequently raised in August 1991 (the average tariff rising from 8 to 17 percent) (Fornalczyk, 1993). The Czech government guaranteed Volkswagen (which acquired a large stake in Skoda) that import tariffs on cars would remain at 19 percent (15 percent for vehicles of EU origin) for at least 4 years.³⁵ However, an active stance does have some effect. For example, the Czechoslovak antitrust office was "absolutely opposed" to the imposition of a high import tariff on cars, and succeeded in lowering the tariff that came to be applied (Flassig, 1993).

The main point to be emphasized is that competition offices have two ways of 'internalizing' trade policy. The first is to oppose trade policies that excessively harm competition on the domestic market; the second is to countervail the anticompetitive effect of trade policy on an *ex post* basis. The first, 'direct' approach has been actively pursued by a number of the CEE competition offices. In this they compare very well to competition offices in OECD countries, who are much less visible. By commenting on or opposing suggested or existing trade policies, the competition offices ensure that the economy-wide implications of sectoral policies/lobbying are recognized and discussed. The main power of competition offices is, however, of an *ex post* nature. Active enforcement, with guidelines that clearly specify that trade policy will be an important consideration in the implementing competition laws, will help bolster the effectiveness of *ex ante* opposition to policy proposals that restrict access to markets.

Another possibility that could be pursued is to use competition law enforcement as an instrument to reduce the probability of facing contingent protection in export markets. This is an issue that applies during both the pre-EA and the EA phase, given the continued availability of antidumping

³⁴ The last statement is arguably untrue, as what is being created are rents. Investors may require some inducements, but guaranteed markets should not be one of them. Indeed, a case can be made that attracting foreign direct investment might be given priority over the breaking up of monopolies, but that an overriding concern should be that the government does not maintain barriers to entry.

³⁵ *East-west*, No. 555, September 2, 1993, p. 6.

to EU import-competing firms under the EAs. The existence of threats of antidumping and safeguard actions on export markets increases the incentive to control state trading, subsidization, and abuse of dominant positions. By enforcing antitrust law and allowing entry, the feasibility for import-competing firms in export markets to argue that unfair trade is taking place is reduced. There are various avenues that can be pursued here. The first is simply an informal 'lobbying' effort on the part of the CEE government involved, under which it is argued that competition law is being actively enforced, that trade barriers are low and that there is therefore no justification for antidumping. This may have some beneficial impact, depending on the importance of the EU industry concerned. A second, complimentary, approach could be to exploit the 'positive comity' principle (see above). The Commission could be formally requested to examine each antidumping petition brought by an EU firm/industry in light of the active enforcement of EU-based competition laws in the CEE home market of the exporter.³⁶ A third is to ensure that the country is treated as a market economy by importing nations implementing antidumping actions. Active competition law enforcement will help bolster the case for this.³⁷

The service sector may be of particular relevance in this connection, as perceived restrictions on access to distribution channels and related services is sometimes held to be one justification for the imposition of antidumping measures. More generally, whatever the impact on contingent protection actions in export markets, it is very important that antitrust authorities actively pursue a strategy of fostering the contestability of service markets. Services are especially important in the process of economic development in their role of inputs into the production process generally. Services increasingly comprise the largest share of value added to a manufactured good. Design, the organization of production, inventory and production management, packaging, distribution, marketing and after sales interaction with clients (guarantees, maintenance) are all service activities.

The nature of services are such that markets are often characterized by proximity requirements (prohibiting trade and implying that competition is local), asymmetric information and imperfect competition.³⁸ Reputation is often crucial in signalling quality to consumers, and as reputation is difficult to establish (being a sunk cost), service markets may be difficult to contest. Pervasive product

³⁶ A statement by Sir Leon Brittan on February 5, 1994 during an informal meeting of EU Trade Ministers and the EC Commission bolsters the importance of establishing that CEE markets are open and that competition laws are enforced: "if the countries of Central and Eastern Europe want EU industry to be satisfied to the point that EU markets are further opened, the best assurance they could have is that the same competition laws exist in Central and Eastern Europe" (Europe Information Service, *European Report*, No. 1924, February 9, 1994).

³⁷ This is no longer an issue in the EU context. As of the entry into force of the Interim Agreements, the CEECs are regarded as market economies by the European Commission.

³⁸ See Sapir, Buiges and Jaquemin (1993) for a discussion.

differentiation may further enhance the market power of incumbent firms. While it may be the case that for certain regulated services it is necessary to ensure that quality standards are satisfied, the competition authorities should attempt to ensure that 'consumer safety justifications' do not act to bolster the market power of incumbent firms by having a protectionist effect.

One lesson that can be drawn from the past decade's experience with privatization of service industries in both developed and developing countries is that many services that were (are) provided by the public sector can also be provided by the private sector, often at much lower cost. Of course, this does not necessarily imply transfer of ownership of assets, or the absence of regulatory oversight. What it does imply is the adoption of institutional forms making such markets contestable. Foreign investors can make a significant contribution to the improvement of the efficiency of 'public' infrastructure services. Development of an efficient economy requires that domestic residents--both final consumers and businesses--have access to high quality services for the lowest possible price. Foreign firms will often offer services that are not provided by domestic incumbents, but for which demand exists. Moreover, because many transnational service firms have an international reputation which they need to maintain, the average quality of the services provided is likely to be both higher and more constant than what is available from domestic firms. Many of the service products that will be offered in host country markets are likely to have been developed and tested elsewhere, further reducing quality uncertainty. However, prices charged will be competitive only as long as care is taken that foreign service corporations do not establish a dominant position and exploit their market power. It is therefore important that efforts are made to ensure that markets remain contestable. In practice this implies that no restrictions should be placed on the number of foreign firms that are allowed to offer specific services. Entry should be free, subject to prudential supervision as deemed necessary, as the most effective source of competition for many foreign service affiliates is likely to be (the threat of entry by) other foreign or local service corporations.

As many service firms possess certain intangible assets that cannot be patented or similarly protected, care must be taken that arrangements that involve the transfer of such assets and that may appear restrictive at first sight are not automatically deemed to violate the competition rules. Great care must be taken in determining whether such practices are anti-competitive, and if so, are detrimental to efficiency. In many cases they may simply reflect the need of a firm to safeguard its reputation for quality. What matters is the impact on the contestability of the markets concerned. Free entry can be expected to ensure that markets remain competitive--so that the variety and quality of services is maximized and prices are minimized. Even service industries that have natural monopoly characteristics, so that only one or two firms are able to exist, can be made contestable via the periodic auctioning of

operating licenses by the government. The main focus of the competition authorities in this regard should be on the regulatory regime that affects services industries.³⁹

The Europe Agreement phase

This phase has two parts: one transitional, the other the period during which the EA is fully implemented and EU membership is not yet achieved. The transitional period is especially important because competition authorities will have to help ensure that EA-envisaged market access liberalization is realized, and is not offset by private/public actions. Once the EAs are in force, national implementation and enforcement of competition rules must be consistent with the relevant EU principles and the implementation rules agreed to by the Association Councils or Joint Committees.

There are two dimensions to EA competition policy disciplines, one pertaining to firms, the other to governments. As far as the latter is concerned, although far-reaching, EA obligations will only bite gradually. The complete territory of the CEE countries will be regarded as a disadvantaged EU 'region' for five years after the entry into force of the EAs. The primary substantive requirement in this period is transparency related: each CEE government must establish an agency or body responsible for the collection of data on state aids and subsidies more generally. Governments might consider going beyond this EA obligation by establishing (or supporting the creation of) an institution that not only collects data on subsidies/state aids, but analyzes such data and combines them into industry-specific measures of effective support. The Industries Assistance Commission in Australia is an often mentioned example that could be emulated (Spriggs, 1991).

Turning to the classic domain of competition policy, two issues arise: (1) the compatibility of existing laws and procedures with the EAs; and (2) the policy options facing CEE authorities once the EAs apply. The first question is addressed in Appendix 2. In principle the CEE competition laws are modelled on Art.85-86 EEC. However, there are inconsistencies with EU language and implementation criteria/guidelines, some of them substantial. An example is the scope for presenting an 'efficiency defense' in merger cases in the Czech and Hungarian laws. This is not possible under the EU Merger

³⁹ Many of the CEE competition offices are sensitive to these issues. For example, the draft Slovak competition law requires the periodic auctioning of operating licenses. The Czech Ministry of Economic Competition has been particularly active in its attempts to enhance competition in the service sector. The Minister opposed a decision by an inter-ministerial commission in the context of the privatization of SPT Telecom to protect it from competition for four years, and supported the idea that foreign entities be able to have 100 percent control of local telecommunications networks. The Ministry has also challenged the 20-year monopoly that was granted to Eurotel, the provider of cellular phones, and supports imports of electricity (Financial Times Business Information, *Finance East Europe*, March 4, 1994).

Regulation.⁴⁰ Another example is the provision in the Hungarian law permitting anticompetitive agreements that are aimed at offsetting 'economic superiority', something that clearly is not possible under the EU rules. In general, there is greater leeway in the CEE laws for 'public interest' defenses. Another example is the possible exemption of cartel agreements on this basis in the Czech and Slovak law. Space constraints prevent a detailed analysis of the various 'incompatibilities' of CEE laws and EU rules and practice (see e.g., de la Laurencie, 1993). Many of the differences will have to be addressed in the coming years.

Turning to policy, an important question is whether the entry into force of the EAs should lead to a change in the relative weight/attention that is granted to different types of competition law violations. For one, free trade/free establishment for EU firms should be enough to ensure that many markets become contestable. Moreover, once an EA is in force, CEE countries may be able to rely in part on enforcement by the EC Commission. This will depend to what extent an anticompetitive practice in a CEE country may have (potential) effects on trade between that country and the EU and therefore be subject to EU enforcement. An implication is that less attention may be necessary with respect to potential abuse of dominant positions, as the contestability of markets will presumably increase substantially. Greater priority might consequently be given to nontradable industries in general, and to those tradeable sectors where liberalization occurs most gradually, or not at all. Taken into account Commission resource constraints and the limited significance of CEE markets in most products, CEE governments cannot realistically rely on the Commission for the enforcement of EA competition disciplines. Vigorous national enforcement will remain crucial in the EA phase.⁴¹

EA obligations in the area of trade liberalization are much more far-reaching than those of the GATT, but are of course preferential in nature. Thus, there is still a need for concern about the trade policy stance vis-a-vis the rest of the world. Although freedom of trade and establishment is to be achieved within ten years of the entry into force of the EAs, tariff elimination is gradual, and QRs have been maintained for certain activities during the transition.⁴² The binding nature of the EAs should

⁴⁰ See Jacquemin (1990) and Neven et al. (1993).

⁴¹ For example, it is unlikely that many mergers involving EU and CEE firms will satisfy the EU's criteria for turnover and market share. In practice, EU enforcement can be expected to apply largely in instances where the merger involves a third-country firm.

⁴² Quotas were to be abolished by the CEECs upon entry into force of the agreements, with a few exceptions for 'sensitive' industries such as automobiles. Poland committed itself to eliminate tariffs on about 30% of its imports from the EU in 1992, and to abolish the remainder over a seven year transition period, with duty reductions taking place during the last four years. Hungary will liberalize 12-13% of its imports over a three year period in annual steps of one-third, another 20% between 1995 and 1997, again in steps of one-third and the rest (two-thirds) between 1995 and 2001, in steps of one-sixth per year. The Czech and Slovak Republics

ensure that protection is indeed transitional, and domestic protected industries will presumably realize that they have only a limited period of time to prepare for competition from EU firms. A potential problem that arises is that protection creates vested interests, and these can be expected to lobby the government for continued assistance. One way this might be done within the confines of the EAs is to argue for 'safeguard' actions once liberalization starts to bite. The primary safeguard mechanism embodied in the EAs allows actions to be taken if imports from the trading partner "cause or threaten serious injury to producers of like products or serious disturbance in any sector of the economy or difficulties which could bring about serious deterioration in the economic situation of a region" (Article 30 of the Hungarian EA). This is very broad language. The concepts (criteria) are also not defined, nor is reference made to the GATT or other treaties for guidance. There are no explicit sunset provisions or time limits.⁴³

Competition offices should take into account the antitrust implications of safeguard actions, and actively enforce the law in instances where safeguard actions result in violations. Similar issues may arise as far as establishment is concerned. The CEE countries will grant free entry and national treatment to EU firms, subject to negotiated phase-in periods for certain sectors or activities. The modalities and content of these exceptions again differ across CEE countries.⁴⁴ There is also a need to consider other

will dismantle over a seven year period. A preferential tariff quota was established by Poland for motor vehicle imports from EC producers (25,000 units, to increase by 5% a year, and to be abolished within 10 years), and a list of 144 items remain subject to import licensing in Hungary. This includes passenger cars (subject to a preferential quota of 50,000 units, to increase by 7% per year), aircraft, telecommunications equipment, chemicals, pharmaceuticals, plastics, wood and leather products, and footwear. Between January 1, 1995 and end-1997, Hungary is to eliminate quantitative restrictions on EC exports of these goods up to an amount of 40 percent of such imports. All QRs are to be eliminated by end-2000, and are to be increased by 10 percent per year during the transition period.

⁴³ The foregoing refers to the EAs general safeguard clauses: e.g., Articles 29 and 30 of the Hungarian EA. The EAs also contain a safeguard clause allowing temporary entry restrictions and/or trade barriers to be introduced by CEECs during the first stage of the transition period to support industrial and commercial sectors undergoing restructuring programs, of an 'infant industry' nature, or facing elimination or a drastic reduction in total market share. Tariffs, if used, are not to exceed 25%, EU producers are to be given a margin of preference, quotas if used are not to exceed 15% of the total industrial imports from the EU, and actions may only be taken within three years of liberalization of market access and are not to last more than five years.

⁴⁴ Two EAs are representative. Poland granted immediate freedom of establishment and national treatment for construction and most manufacturing activities, with the exception of mining, processing of precious stones and metals, explosives, ammunition and weaponry, pharmaceuticals, alcohol, high voltage power lines and pipeline transportation. All but the last two activities are to be liberalized by the end of the first stage of the transition period (5 years), at which time most service sectors will also be liberalized (financial, legal and real estate services excepted). By the end of the transitional period (ten years) acquisition of state owned assets under privatization; ownership, use, sale and rent of real property; real estate agency services; legal services; high voltage power lines; and pipeline transportation will be liberalized. The Czechoslovak agreement liberalized all sectors immediately except for defence industry, steel, mining, acquisition of state-owned assets under privatization, ownership, use, sale and rent of real property, and real estate service activities, and the financial

options through which firms may seek to continue to benefit from government support. As noted earlier, Poland has given EU car producers preferential access to its market, by imposing a tariff quota on imports, and defining criteria for the allocation of this quota that strongly favor European firms that have invested in Poland (Messerlin, 1994). Tariffs on cars are currently high, standing at some 35 percent. The provisions of a recent joint venture agreement between FSO, the Polish state-owned car company, and General Motors illustrates the pressures that may arise to maintain such the benefits of arrangements. The Polish government provided assurances in the contract establishing the joint venture that it "will compensate GM for losses resulting from future changes in tariff and tax conditions."⁴⁵ That is, GM will apparently be able to demand compensation from the government to offset the reduction in the tariff from 40 percent to zero that is required under the EA over a ten year period. The signal to potential competitors is clear: the costs of contesting the Polish market will be higher. Careful scrutiny should be given to such arrangements so as to ensure that no abuse of a dominant position results, and that markets remain contestable.

An implication of the foregoing is that competition offices need to continue to keep a wary eye on trade policy. The entry into force of the EA should imply that somewhat less emphasis can be given to the behavior of firms with a dominant position that produce tradables, and that greater priority be given to nontradables (services) and industries where the transition to free trade and/or freedom of establishment is long or delayed. As already noted, access to many service markets will only be liberalized gradually, on a national treatment basis, with establishment being necessary. The contestability of these markets will largely be determined by the attitude taken by the antitrust authorities. The EAs do not require liberalization of cross-border trade in services, this presumably being kept off the agenda to prohibit regulatory competition. As a result, it remains important that the competition authorities continue to closely monitor the contestability of service markets.

A special complication arises from the continued existence of antidumping and safeguard threats under the EAs. This may be an inducement for CEE firms to collude, if not explicitly then tacitly, with each other and with EU competitors. Continued threats of contingent protection on the part of the EU implies that CEE firms will face different standards than their EU competitors. EU firms will be permitted to engage in price discrimination or sell below cost on the EU market, whereas CEE firms will be constrained in pursuing such a strategy by the existence of EU antidumping procedures. On EU

service industry. These activities are to be liberalized by the end of the ten year transition period. Both countries permanently exclude ownership of natural resources and agricultural land/forests.

⁴⁵ "GM and Polish carmaker reach assembly deal," *Financial Times*, November 14 1993, p. 5. It was GM Europe that originally asked the Polish government to introduce this high tariff rate, apparently making this a precondition for its joint venture with FSO (Messerlin, 1994, p. 9).

markets, price discrimination by CEE firms in the sense of selling products at prices below those charged at home may lead to antidumping petitions if this injures EU firms. Such dumping is unlikely to be the result of concerted practices or abuse of dominant positions, as these will be difficult to attain by CEE firms. Nor can it be argued that CEE firms are unfairly benefitting from a protected home market. Once the EAs are implemented, all tariffs, QRs, and restrictions on FDI will have been abolished.

As antidumping remains a threat under the EAs, the focus should arguably still be on reducing the likelihood of contingent protection being invoked by the EU. Strict enforcement of antitrust may help convince the EC Commission and Member States to be hesitant to pursue complaints of dumping. Advocates of antidumping policies often argue it is a justifiable attempt by importing country governments to offset the market access restrictions existing in an exporting firm's home country that underlie the ability of such firms to dump. Such restrictions may consist of import barriers preventing arbitrage, but may also reflect the non-existence or non-enforcement of competition law by the exporting country.⁴⁶ Antidumping is then defended as an inferior instrument to offset such 'government-made' competitive differences, the optimal solution being held to be elimination of the differences.

The experience that has been obtained with attempts to abolish antidumping in the context of regional integration agreements suggests that there are at least three necessary conditions for the abolition of contingent protection: (1) free trade and freedom of investment; (2) disciplines on the ability of governments to assist firms and industries located on their territory; and (3) the existence and enforcement of competition (antitrust) legislation (Hoekman and Mavroidis, 1994). All three elements can be regarded as forming an implicit market access 'guarantee', the objective being to safeguard the conditions of competition on regional markets. As far as the CEE countries are concerned it seems that, although these conditions will to a very great extent be satisfied, the EU felt the need to take out insurance. Clearly, the first best strategy for CEE countries is to seek the elimination of antidumping once the EAs have been fully implemented. This is an issue that could be taken up by the Association Councils.

A second best, possibly transitional, strategy could consist of attempts to secure agreement that antidumping becomes the mechanism of last resort. One possibility in this connection is to seek agreement that allegations of dumping are first investigated by the EU's competition authorities (DG-IV). The objective of this investigation would be to determine whether the exporting firm or industry engages in anti-competitive practices or benefits from government-created or supported entry barriers that violate

⁴⁶ Thus, the U.S. has claimed that lax Japanese antitrust enforcement permits Japanese firms to collude, raise prices, and use part of the resulting rents to cross-subsidize (dump) products sold on foreign markets. See Garten (1994) for a detailed defense of antidumping that emphasizes entry barriers in the exporter's home market.

the EAs. If anti-competitive behavior is found to exist, 'standard' remedies would be applied (i.e., cease and desist orders, fines, etc.). Initiation of an antidumping investigation should only be possible if the investigation by the competition authorities has revealed the existence of barriers to entry in the CEE market that do not violate the EA.

Third-best, in the absence of a formal agreement on the matter, is to continue to vocally oppose antidumping, especially once the EAs are fully implemented. Given that EU-consistent competition rules will have been implemented, a CEE government has strong arguments on which to base opposition to EU antidumping actions. Continued action against state aids will also help to reduce the scope for contingent protection. The fact that the Commission has somewhat greater discretion on antidumping than do administering authorities in certain other jurisdictions further increases the incentives for the CEE countries to 'make a case.'

Whatever turns out to be feasible with regard to antidumping, it should be remembered that safeguard actions remain a possibility. The elimination of this option should also be on the agenda, a necessary condition again being that the EAs have been fully implemented, and the resulting adjustment has occurred. The main issue in the short run is to reduce as much as possible the scope for EU firms to argue that CEEC firms are trading 'unfairly'. Undercutting the basis for the rhetoric of allegations of unfair trade is important, as protection is then much more easily recognized for what it is.

The Third Phase: Membership of the European Union

It is unclear how long it will take each CEE country to achieve membership of the EU. What matters from the antitrust perspective is not when accession will occur, but what changes will be required in competition policy enforcement. The specifics of the competition legislation and the procedures and criteria that are applied are largely unconstrained by EA membership. However, the scope of membership is much more far-reaching than the EAs. The EAs are ambiguous regarding the extent to which access to service markets will be liberalized. Disciplines in areas such as the regulation of utilities, and telecoms will expand. As a result the reach of EU competition disciplines is likely to expand. National regulations that may restrict entry into certain industries and that would not be covered by the EAs may become impossible to maintain once a member. Another change is that the threat of contingent protection disappears. Intra EU-CEE antidumping, CVD and safeguard actions will become impossible, if not immediately then after a transition period as was the case under the Treaty of Rome (Art. 91 EEC). Consequently there will be less pressure on national competition authorities to monitor the effects of threats of contingent protection. More importantly, the government essentially loses control of its trade policy, this being an EU competence. External tariffs will therefore have to be adjusted to the EU's common tariff. The EU (Commission) will also become much more of a factor in enforcing

Articles 90 and 92. In short, life becomes much simpler from the perspective of the antitrust authorities. Their main task will be to prevent the exploitation of power on local markets.

VI. Concluding Remarks

The comparative analysis of the competition laws of the CEE countries illustrates that the majority of them have moved towards an, in principle, satisfactory legal framework to promote competition in a relatively short period of time. Although initially under the influence of both the US and the EU competition laws, the CEE countries have chosen by and large to adopt legislation that is similar to that of the EU. At this stage the successful protection of competition in the CEE countries depends almost entirely on national policies, of which enforcement of competition laws is one important element. But even under the EAs, national enforcement will remain important, both because of the relative insignificance of national CEE-markets, but also because of resource limitations on the part of the Commission.

In a number of areas the CEE competition laws and enforcement agencies compare very well with those of OECD countries. The 'trade policy awareness' of the authorities is quite high, indeed, much higher than appears to be the case in many OECD comparators. In part this reflects the political importance or weight that is granted to the competition authorities in many of the CEE countries (e.g., the Czech decision to give the head of the competition office Ministerial rank) and their willingness to attack trade policy decisions that substantially reduce competitive forces on domestic markets. Although the emphasis that is placed on competition policy in the CEECs is in part a reflection of the need to establish a market economy, OECD governments could enhance competition on their markets by emulating some aspects of CEE competition law enforcement. Examples are the mandate to scrutinize and comment on the competition implications of government policies generally, and giving the head of the competition office the opportunity to participate in cabinet meetings.

A number of actions have been identified through which competition law enforcement might be strengthened and be made even more sensitive to trade policy. The legislative possibility for antitrust agencies in the CEE countries to act *ex officio* does not appear to have been fully exploited, although this may largely be the result of the process of the transition towards private ownership and a market economy. The development of detailed guidelines would help both reduce uncertainty regarding the priorities given by the competition authorities to types of competition-reducing practices, and clarify what practices will not be pursued. One common denominator in the legislation of all CEE countries is the wide discretion that the agencies entrusted with the enforcement of competition laws enjoy. This can

have a negative side, in the sense that a number of desirable *per se* prohibitions simply do not exist. An offsetting, positive counterpart is that if discretion is exercised in a pro-competition way, the "jurisprudence" created in this field could further promote the goals of the competition laws. Incorporation of the trade policy stance pertaining to an industry should explicitly be taken into account when defining the relevant market in the enforcement of antitrust. Guidelines to this effect should also be published. Whenever market shares are defined as a threshold (i.e. in the definition of dominant positions) they should be linked to market contestability considerations—i.e., explicit public recognition that what matters is market power. It would prove very useful for the evolution of the competition philosophy in the CEE countries, and at the same time enhance transparency, if competent agencies were to publish the reasoning underlying their decisions.

One avenue that could be further explored during the transition phase (i.e., until full implementation of the EAs) is the exploitation of the principle of "positive comity". This could provide a link between antidumping and antitrust in instances where CEE countries are facing antidumping threats or actions on the part of the EU. That is, the EC Commission could be asked to apply competition policy criteria in antidumping investigations against products originating in CEE countries, ensuring that there is a threat to competition, not just a threat to an EU competitor. This could be sought on an informal basis during the transitional period. If it proves to be impossible to obtain agreement to phase out antidumping once the EAs are fully implemented, a second-best policy could be to formalize the link between competition law enforcement and antidumping investigations. More generally, since the CEE countries have adopted legislation comparable to that of the EU in the competition field, one can assume that if they enforce their competition laws vigorously, EU-consistent minimum standards will be respected. This may effectively raise the threshold for EU import-competing industries seeking antidumping relief. Vigorous enforcement of competition disciplines in service industries, especially distribution-related, may further help reduce the potential for EU firms to seek contingent protection. In any event, enhancing the contestability of service markets will be very important in the development of a competitive environment. In general it would be desirable to create an independent and objective body that is given the mandate to evaluate government policies from a competition policy perspective. In the absence of such an entity, competition offices should devote resources to building a capacity and reputation for high-quality, objective analysis of the effects of government policies that affect the contestability of markets.

Until the EAs are fully implemented it is important to reduce as much as possible the risk of being treated as an "unfair trader." Safeguard actions will always remain possible as long as membership of the EU has not been attained. But safeguard protection is more difficult to seek and obtain if the case for arguing that CEE firms are benefitting from trade barriers, state aids, or various

types of government maintained entry barriers is weak. From this perspective active competition law enforcement will be of particular importance to the CEE countries in the immediate future.

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Competition Disciplines in the Europe Agreements

Article 62⁴⁷

1. The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and Hungary:

(i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;

(ii) abuse by one or more undertakings of a dominant position in the territories of the Community or of Hungary as a whole or in a substantial part thereof;

(iii) any public aid which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods.

2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86, and 92 of the Treaty establishing the European Economic Community.

3. The Association Council shall, within three years of the entry into force of the Agreement, adopt by decision the necessary rules for the implementation of paragraphs 1 and 2.

4.a For the purposes of applying the provisions of paragraph 1, point (iii), the Parties recognize that during the first five years after the entry into force of the Agreement, any public aid granted by Hungary shall be regarded as an area identical to those areas of the Community described in Article 92.3 (a), of the Treaty establishing the European Economic Community. The Association Council shall, taking into account the economic situation of Hungary, decide whether that period should be extended by further periods of five years.

4.b Each party shall ensure transparency in the area of public aid, inter alia by reporting annually to the other party on the total amount and the distribution of the aid given and by providing, upon request, information on aid schemes. Upon request by one party, the other party shall provide information on particular individual cases of public aid.

5. With regard to products referred to in Chapters 11 and 111 of Title 111 [i.e. agriculture] the provision of paragraph 1 (iii) does not apply. Any practices contrary to paragraph 1 (i) should be assessed according to the criteria established by the Community on the basis of Articles 42 and 43 of the

⁴⁷ In the Interim Agreements the relevant Article is identical to that in the Europe Agreement, except that each reference to the Association Council is replaced with a reference to the Joint Committee set up by the Agreement on Trade and Commercial and Economic Cooperation.

Treaty establishing the European Economic Community and in particular of those established in Council Regulation 26/1962.

6. If the Community or Hungary considers that a particular practice is incompatible with the terms of the first paragraph of this Article, and is not adequately dealt with under the implementing rules referred to in Paragraph 3, or in the absence of such rules, and if such practice causes or threatens to cause serious prejudice to the interest of the other Party or material injury to its domestic industry, including its service industry, it may take appropriate measures after consultation within the Association Council or after 30 working days following referral for such consultation.

In the case of practices incompatible with paragraph 1 (iii) of this Article, such appropriate measures may, where the General Agreement on Tariffs and Trade applies thereto, only be adopted in conformity with the procedures and under the conditions laid down by the General Agreement on Tariffs and Trade and any other relevant instrument negotiated under its auspices which are applicable between the Parties.

7. Notwithstanding any provisions to the contrary adopted in conformity with paragraph 3, the parties shall exchange information taking into account the limitations imposed by the requirements of professional and business secrecy.

8. This Article shall not apply to the products covered by the Treaty establishing the European Coal and Steel Treaty which are the subject of Protocol N 2.

Article 64

With regard to public undertakings, and undertakings to which special or exclusive rights have been granted, the Joint Committee shall ensure that as from the third year following the date of entry into force of the Agreement, the principles of the Treaty establishing the European Economic Community, notably Article 90, and the principles of the concluding document of the April 1990 Bonn meeting of the Conference on Security and Cooperation in Europe, notable entrepreneurs' freedom of decision, are upheld.

An Overview of Competition Legislation in Bulgaria, the Czech Republic, Hungary, Poland and the Slovak Republic

BULGARIA

The "Law on the Protection of Competition"⁴⁸ (published in State Gazette no. 39 of May 17, 1991, Correction State Gazette no. 79/1991) constitutes the legal framework protecting free competition in Bulgaria. According to Art. 1(1): "the object of this law is to guarantee the conditions necessary for free enterprise in manufacturing, trade and services, for a free determining of prices and for the protection of consumers' interests."

The Act differs not only linguistically (the term 'monopoly position' is used to cover dominant positions as well as monopolies), but also substantially from the laws in force in the other CEE countries. The scope of discretion as well as the form of action of the competent authority are much more restricted. The Bulgarian Act comprises a set of definitions and strict prohibitions of behavior that is deemed to be anticompetitive and leaves little room for the competent authority to exempt specific arrangements. The Act does not make it clear whether the effects doctrine suffices for the authority to assert jurisdiction. Art. 1(2) implies this possibility, however, as it states "... which could lead to restrictions on competition in Bulgaria", without explicitly stating the locus of the anticompetitive behavior.

The Act distinguishes between 'monopoly positions' and 'other prohibited practices'. 'Monopoly positions' cover not only monopolies, but also dominant positions and to some extent mergers. 'Other prohibited practices' deal mainly with forms of collusion. According to Art 3, a monopoly position exists if a person either possesses the exclusive right to engage in a certain kind of economic activity by virtue of law or has a market share that exceeds 35% of the relevant market. The threshold set forth in the Act in this second case certainly does not qualify as a monopoly. Indeed, in some jurisdictions it does not even suffice to qualify as a dominant position.

All authorities are prohibited from adopting decisions that might lead to the creation of 'monopoly positions'. This prohibition is only effective, however, to the extent that the aforementioned decisions "limit significantly the freedom of competition or the free determining of prices" (Art. 4). Accordingly, if mergers lead to 'monopoly positions', they are prohibited as well (Art. 5). However, an exemption may be requested from the competent authority. If no opposition is registered within thirty days of notification, authorization is considered granted (Art. 6.2).

The Act includes a list of abuses of 'monopoly position'. This list includes classical cases like price-fixing, restricting output or access to markets, tie-ins, monopoly pricing, market sharing, and

⁴⁸ Hereinafter the Act.

exclusive distribution agreements. While its wording is wide, the list seems to be an *exhaustive* one.⁴⁹ When it comes to the regulation of forms of collusion, the Act contains only one provision that is all encompassing: Art. 8(2) stipulates that: "contractual terms restricting one of the parties with respect to the choice of the market, suppliers, buyers, sellers or consumers, except when the restriction arises from the nature of the contract and is not injurious to the consumers, are prohibited." The possibility to request an exemption, outside the grounds enlisted in Art. 8(2) is open, if such a request is deposited to the competent authority. (Art. 9).

Procedural provisions

The competent authority entrusted with the responsibility to ensure that the substantive provisions of the Act will be observed, is the "Commission for the Protection of Competition". Its tasks are described in the "Statute on the organization and activities of the Commission for the protection of competition"⁵⁰ (published in State Gazette no. 94 of November 15, 1991). Art. 3 of the Statute stipulates that the Commission for the Protection of Competition has the following basic functions: (1) preventing restrictions on competition in Bulgaria; (2) applying the measures provided for in the laws against restrictions of competition and against unfair competition; and (3) ensuring protection against abuse of a monopoly position in the market, as well as against other activities which may lead to a restriction on competition."

The Commission consists of a chairman, two vice-chairmen and eight members. All are appointed by the National Assembly for a period of five years.⁵¹ The guarantees for transparency are expressed through the obligations to publish and notify all decisions as well as through the possibility to have hearings of the interested parties before the Commission.⁵² The Commission can self-initiate or respond to complaints brought by natural or legal persons.

The discretionary power of the Commission is, to some extent, curtailed in comparison with those of the authorities in the other CEE countries, mainly because of the heavier reliance of the Bulgarian Act on *per se* prohibitions. However, much depends on how the Commission makes use of its powers when dealing with these issues, as the wording of the Act still leaves some discretion to the Commission in a number of areas. What the Commission cannot do is to impose fines. If it thinks that this should be the appropriate remedial action, the Commission must submit a case before the competent Bulgarian Court of Law (Art. 18.2 of the Act). The Commission does possess one specific remedy that the authorities of other CEE countries do not. Art. 16 stipulates that "whenever an abuse of monopoly position occurs and at the initiative of the Commission for the Protection of Competition, the Council of Ministers or a body authorized by it may establish maximum and/or minimum prices which shall be

⁴⁹ For example, "applying an obviously unequitable approach towards different clients or unequitable term ..." (Art. 7.1). Art. 7 does not include any word to this respect that would make the list indicative.

⁵⁰ Hereinafter the Statute.

⁵¹ Art. 2.2 of the Act; half of the members must be qualified lawyers with a least 10 years professional experience.

⁵² See Arts. 9ff of the Statute.

obligatory for the person with a monopoly position." Although the ultimate decision does not lie within its competence, it is the Commission that sets the process in motion.

CZECH REPUBLIC

The "Competition Protection Act" of the Czech and Slovak Federal Republic (No. 63/1991 Coll. of law) entered into force in March 1991. It was amended by the Czech Republic in November 1993 (No. 286/1993 Coll. of law). The amendment of the Act implies rather limited changes to the 1991 Federal law. More substantial changes in order to make the legislation fully compatible with EU law are expected to be made by 1996.

The 1991 Act is a comprehensive piece of legislation that resembles, to a large extent, the antitrust rules of the EU. The basic objective of the Act is "to protect economic competition and create conditions for its further development, and to prevent the creation and maintenance of monopolistic or dominant position of legal and physical persons in their business activities, if it precludes or restricts economic competition" (Art.1). The Act distinguishes between forms of collusion (with special treatment of mergers) and dominant positions. It provides for the establishment of the office of the Czech Republic of Economic Competition, which is entrusted with the responsibility of eliminating anti-competitive measures. Anti-competitive practices in both goods and services markets are covered (Art.3). The November 1993 amendment extends the reach of the law to associations of business, including chambers of commerce.

The Act provides a list of *per se* prohibited practices, that are deemed to be anti-competitive. These practices, listed in Art 3(2), to a large extent reproduce the forms of collusion described in Art. 85 EEC, and include price-fixing, market segmentation, barriers to entry, and limitation of production. The list in Art 3(2) is illustrative, not exhaustive.⁵³ Art. 3(1) stipulates that: "Agreements and other forms of mutual understanding achieved by entrepreneurs which result or, because of their nature, may result by influencing conditions of production or turnover in the goods and services market ... in the elimination or restriction of economic competition, are described as cartel contracts ... which are illicit and void if this Act does not state otherwise or if the body for economic competition ... has not granted an exception." This wording is wider than the corresponding wording in Art. 85(1) EEC.

In the November 1993 amendment the Ministry for Economic Competition was granted the right to provide block exemptions along the lines of Art. 85(3) EEC. Moreover, reference is no longer made to cartel agreements, but to "agreements distorting competition." This clearly suggests that both vertical and horizontal agreements will be covered by the law.

Per se prohibitions are tempered by the possibility for parties to such contracts to demand an exception of the competent authority, i.e. the Ministry for Economic Competition. The Act distinguishes between various forms of collusion for which an exception has been requested. For an exhaustive list (embodied in Art. 3(3)), an exception is granted if the authority does not communicate in writing its disagreements with the contract within two months (Art.3.4, 'special procedure'). The list in Art. 3(3) consists of: (i) uniform application of conditions of trade; (ii) rationalization of economic

⁵³ This interpretation is dictated by the wording in Art.3(2). Illicit, ... , are in particular contracts or their parts involving (emphasis added). The same is true for the list embodied in Art. 85(1) EEC.

activity, particularly specialization agreements; (iii) non-discriminatory rebates granted to customers; and (iv) shares in supplying the market if they are below a certain threshold. For these categories a presumption therefore exists that an exception should be granted. Entrepreneurs may also apply for exception on grounds other than those in Art. 3(3). In this case (general procedure), the petitioner has to clarify the reasons in the application and to enclose a draft of the contract in question. The November 1993 Amendment removed non-discriminatory rebates from Art. 3(3).

An exception can be granted if the restriction of "economic competition ... is in the public interest,"⁵⁴ with particular attention being paid to the interests of the consumers (Art.5.2). Exemptions are time-limited and cannot have retroactive effect (Art.5.4). For certain types of contracts no exemption can be granted. Art. 5(3) of the Act provides an exhaustive list which includes exclusivity contracts, contracts that violate legal inhibition on ethics of competition or contracts the scope of which obstructs in a substantial way the economic competition in the market.

The Czech legislation in this regard is therefore similar to EU-antitrust legislation as it combines *per se* prohibitions with the possibility of specific exemptions. In only a very few cases are exemptions not obtainable. Consequently, the competent authority enjoys a considerable margin of discretion. Even with respect to those contracts where no exemption can be granted, the competent authority still has some leeway, as it must interpret terms. The notion of "substantial obstruction of economic competition", for example, directly defers judgment to the competent authority that will have to estimate to what extent the proposed obstruction of economic competition is substantial. In applying the law, the Ministry of Economic Competition differentiates between horizontal and vertical agreements. It is gradually introducing criteria for the assessment of horizontal agreements, using OECD guidelines.

With respect to mergers, the 1991 Act establishes 30 percent of total turnover in the relevant market as the threshold above which mergers are presumed to limit economic competition in the relevant market (Art. 8(3)). All mergers that exceed the threshold must be notified to the authority for approval; such contracts were void (illegal) *unless* approved (Art. 8(4)). Mergers were regarded as approved if the authority had not decided within three months following notification. The November 1993 amendment no longer makes such mergers void by definition. Instead, they cannot enter into force until approved. Under the new provisions, the focus of the authorities will be solely on the economic effect of the merger, not on the form of the agreement. In judging whether a merger that exceeds the threshold should be approved, the authority must determine whether the economic advantages brought about by the merger outweigh the negative effects created by the restriction of competition (Art. 8(4)). The wording of the Act on this point further supports the view that the authority enjoys a considerable amount of discretion.

With respect to dominant⁵⁵ positions the Act follows, to a large extent, the approach adopted in Act. 86 EEC: it is not the existence or creation of a dominant position that is sanctioned, but its abuse (Art. 9(3)). An indicative list of examples of abuse of dominant position (Art. 9(3)) draws

⁵⁴ See Art 5(2) of the Act.

⁵⁵ According to the Act dominant position exists where the entrepreneur is not subject to substantial competition.

substantially from the list included in Art. 86 EEC.⁵⁶ The Act departs on two points from Art. 86 EEC: first, it provides a fixed threshold above which an entrepreneur is deemed to be in a dominant position: a market share of at least 30% of supply of identical, comparable or mutually commutable goods of the relevant market in the course of the calendar year (Art. 9(2)). No such threshold exists in Art. 86 EEC. Second, entrepreneurs who have reached this threshold, including by merger are required to report this to the authority without delay (Art. 9(1)). The obligation embodied is one of notification only, since it is not the creation but the abuse of a dominant position that is of concern. The notification will help the authority to better monitor the market behavior of large entities and determine whether or not abuse occurs. The 1993 amendment gives the Ministry the right to break up dominant firms or monopolies if such entities seriously constrain competition. A basic problem here is that a *de facto* obligation is imposed on entrepreneurs to monitor their market share. Such an obligation might prove to be difficult to meet, especially taken into account that the relevant markets are not well defined.

Article 18 of the Czech and Slovak law gives the authorities the mandate to comment on draft laws and actions of state administrative and local bodies that restrict competition.

Procedural provisions

Originally the Act provided for an office of Economic Competition and for a Federal Office for Economic Competition dealing with cases that had a bearing on the markets of both the Czech and the Slovak Republic (Art. 10). After the two Republics decided to abolish the Federation, the Office of the Czech Republic for Economic Competition is the sole competent authority to deal with competition-related issues in the Czech Republic. Its jurisdiction is circumscribed in Art. 10. It has competence "in cases concerning protection against, limiting or eliminating competition which may have effects in the territory of the Czech Republic ..."⁵⁷ This wording suggests that the 'effects' doctrine constitutes the basis of the Czech jurisdiction. Art. 11 of the Act states that the Office is mainly responsible for taking action against anti-competitive behavior, for approving mergers that are above the set threshold and collusive agreements where the economic benefits offset the costs of the restrictions of competition.

The authority has the competence to impose fines on entrepreneurs for violating the Act. The 1993 amendment strengthened punitive measures against the abuse of a dominant position, and agreements restricting competition. The penalty for infringing the law was raised from a maximum of 5 percent of turnover for the last completed year to a maximum of ten percent of net turnover. If violators profited from the breach of obligation, fines can amount to the total profit gained because of the breach (Art. 14). All fines are to be imposed within set time-limits. Proceedings may be self-initiated or launched upon request. All interested parties have the right to express their views, and, if need be, oral hearings can be organized. All decisions of the authority are subject to appeal before civil courts within 30 days from the date when the decision was handed to the party to the proceeding (Art. 13). All employees of the authority are required to maintain confidentiality (Art. 16).

⁵⁶ *A fortiori*, all this is valid in cases of monopoly as well. Monopolies are not deemed to be illegal; they should not, however, abuse their power.

⁵⁷ Emphasis added.

Last but not least, as a transition measure, state administration bodies are required, when transferring state property (privatization) to guarantee the elimination of existing monopolies and/or to disable the creation of new monopolies (Art. 19).

HUNGARY

Act LXXXVI of 1990 on the Prohibition of Unfair Market Practices is the legislative framework dealing with the protection of free competition in Hungary. This law was adopted by the Hungarian Parliament on November 20, 1990, and entered into force on January 1, 1991. The basic objective of the Act is embodied in the Preamble: "For the sake of protecting the freedom and priority of economic competition, forms of conduct that are contrary to fair market practices must be banned, and supervision over the structural merger of enterprises must be introduced by creating the necessary organization forms".

The Act addresses forms of collusion, dominant positions termed economic superiority and mergers. The "effects" doctrine is again followed: Paragraph 14 prohibits forms of collusion "which would result in restriction or exclusion of economic competition, irrespective of whether the agreement was concluded on the territory of the Hungarian Republic or not". The Act applies to both goods and services, with the exception of banking, insurance and security markets. The approach taken by the other CEE countries is, in principle, also followed here: a list of prohibited practices is included, with the possibility for participants in such practices to request the competent authority an exemption. The Hungarian Act provides a general rule of what constitutes a prohibited practice and gives only a few examples of what form such practices may take. The general rule is that for practices not to be prohibited, they should not "result in restriction or exclusion of economic competition" (para. 14). The wide wording implies that the authorities entrusted with the interpretation of this paragraph enjoy wide discretion.

The examples given in the Act are the classic ones also listed in the other competition laws, i.e., price-fixing, market segmentation, limitation of output, etc. (para. 14). An agreement that falls under the general rule or the examples given in paragraph 14 is not prohibited if it is aimed at "stopping abuse of economic superiority" or if it is of "minor significance" (Para. 15). The latter criterion is further explained in paragraph 16: an agreement is considered to be of minor significance if on the market in question the joint shares of the participants do not exceed 10%. For the market in question to be defined (i.e. the relevant market) the goods that form the subject of the agreement (directly competitive but also substitutable) and the geographic area have to be taken into account in accordance with the definition provided for in the same paragraph. Paragraph 17 provides a second rationale for exemption from prohibition if: "the concomitant restriction or exclusion of economic competition does not exceed the measure necessary for attaining economically justifiable common goals; and the concomitant advantages are greater than the concomitant disadvantages." Again, the wording leaves ample room for discretion when it comes to its interpretation. On this point, however, the Act gives some indication as to what might be a valid reason justifying the exemption (concomitant advantage) and what might be a valid reason justifying the prohibition (concomitant disadvantage).

As advantages the legislation considers the better prices that might result from the implementation of the agreement, the better quality of the products, rationalized production, and

technological development.⁵⁸ Conversely, if the joint shares of the participants to the agreement exceed 30% of the relevant market, it would be considered a disadvantage. The finding of an advantage or of a disadvantage by the competent authority does not automatically lead to exemption or prohibition; these are rebuttable presumptions. However, the Act gives the legislator's view as to which agreements are considered pro- and which anti-competitive.

The Hungarian Act prohibits abuse, not the creation of a dominant position (economic superiority). An indicative list of what might constitute an abuse of a dominant position includes unjustified refusal to conclude contracts and erection of barriers to entry (Art.20). The Act also provides an indicative list of what might constitute a dominant position: a share that exceeds 30% in the relevant market (50% if it is joint shares of three entrepreneurs), or a situation where the merchandise of an entity cannot be procured elsewhere (Para.21).

Parties that want to merge are jointly under the obligation to notify the competent authority in order for the latter to grant an authorization if: the joint share of the participants on a given market as regards any goods sold by them in the previous calendar year exceeds 30 per cent; or the joint returns on sales of the participants in the previous calendar year exceeded 10 billion forints" (Para.21). In principle, any merger that hampers competition will not be authorized (Paragraph 24.1). However, a merger can be exempted, notwithstanding paragraph 24.1, if (a) the advantages of economic competition outweigh the disadvantages; (b) economic competition as regards the larger part of the goods in question is not ruled out; or (c) it promotes transactions on foreign markets which are advantageous from the viewpoint of national economy.⁵⁹

Paragraph 60 of the law requires ministers to consult the competition office on all draft laws that seek to limit competition.

Procedural Provisions

The Office of Economic Competition is the competent authority entrusted with the responsibility to supervise competition as regulated in the Act (Paragraph 52). It is headed by a President and two vice-presidents who are appointed for six years by the President of the Republic at the proposal of the prime minister (paragraph 53). Their mandate is terminated after 6 years, or following a resignation, death or dismissal. As to the latter, the only case where a subjective judgement by the supervising authority is required for a dismissal concerns the case where "they become unfit for their office on a lasting basis" (Para. 54).

The Office is responsible for prosecuting violators of the Act, but also for granting exemptions. Proceedings may be launched at the request at the interested party or ex officio. (Paragraph 33) Strict time-limits are imposed within which the Office has to make a ruling; transparency of the process is also guaranteed through hearings (Paragraph 34 ff). In discharging its responsibilities, the Office may impose fines that are directly connected to the material advantage attained through the unlawful conduct; these can vary between 30% and 200% of such an advantage (paragraphs 43, 48).

⁵⁸ These reasons are provided in paragraph 17(2). The list is indicative; Paragraph 17(2) stipulates "from the aspect of exemption from prohibition is *especially qualifies*" (emphasis added).

⁵⁹ See paragraph 24(2).

Only in exceptional circumstances can the 30% threshold be violated. All rulings of the Office are appealable before the courts within 30 days from delivery of the ruling passed on the matter (paragraph 41).

Because of "the drastic restructuring of its economy, and its trial-and-error approach to competition law, the Hungarian government plans to submit draft changes to the 1990 statute to the Parliament during the summer of 1994."⁶⁰

POLAND

The Polish competition law is embodied in the Act of February 24, 1990 on counteracting monopolistic practices, as amended by the Act of June 28, 1991. The objective of the Act is to counteract "monopolistic practices of economic entities and their combinations that have an effect within the territory of the Republic of Poland".⁶¹ The 'effects doctrine' is therefore espoused. The Act covers both the goods and the services markets.

The Act distinguishes between "monopolistic practices" and mergers. The first are, in principle, prohibited. The creation of dominant position or of a monopoly is not prohibited per se; what is prohibited is its abuse. Art. 7, for example prohibits "economic entities in a monopolistic position" from engaging in price-fixing or from charging "excessively exorbitant". the creation of a monopolistic position is not prohibited through; the Act, however, makes it difficult for entities to acquire a monopolistic position, mainly by prohibiting, in principle, "monopolistic practices". The abuse of dominant position is considered to be a "monopolistic practice," although the term "monopolistic practices" is not defined, but covers forms of collusion comparable to those covered, for example in Art. 85(1) EEC (with the notable addition of the abuse of dominant position). The "monopolistic practices" include, inter alia, price-fixing, market segmentation, and imposition of barriers to entry or onerous contract terms yielding undue economic benefits to the imposing entity. The wording of a least two articles of the Act suggests the list of monopolistic practices embodied in the Act is exhaustive.⁶² Arts. 4, 5, 7 and 9 are the only articles in the Act covering this subject area. Leaving Art. 9 aside—since it deals with a very specific issue (see below)—a decision by the competent authority can be taken with respect to the "monopolistic practices" specified in the other three articles. While the wording is wide, making the list exhaustive is unlikely to prove effective.

If there is a finding that monopolistic practices have occurred, the competent authority will issue a decision ordering their termination and determining the conditions of the termination (Arts. 6 and 8). Such practices however, can be exempted from prohibition if the following two conditions are met: (i) they are necessary to conduct an economic activity; and (ii) they do not result in a significant restraint

⁶⁰ Declaration by the Head of Hungary's Office of Economic Competition, March 19, 1993, BNA *Antitrust and Trade Regulation Report*, No. 1607, March 25, 1993, p. 330.

⁶¹ See Art. 1 of the Act.

⁶² Art. 6 stipulates "The monopolistic practices specified in articles 4 and 5 are prohibited"; Art. 8 further stipulates "if there is a finding that the monopolistic practices specified in articles 4, 5 and 7 have occurred..." (emphasis added).

of competition (Art. 6). The burden of proof in this case lies with the party that is claiming the existence of both conditions.

As already stated, abuse of dominant position is considered a prohibited monopolistic practice. Dominance is defined "as the position of an economic entity if it does not encounter significant competition in a national or local market; it is presumed that an economic entity has a dominant position if its share exceeds 40 percent" (Arts. 2, 7). An indicative list of abuses of dominant position is provided, including price-fixing, market segmentation, and refusal to sell (Art. 5). Since abuse of dominant position is considered to come under "monopolistic practices", it is prohibited unless specifically exempted by the competent authority.

Art. 9 deals specifically with two practices: specialization contracts and joint sales or joint purchases of commodities. The competent authority is to issue a decision prohibiting such agreements, if they imply a significant restraint of competition and yield no economic benefits to the participants (e.g., a significant reduction in production or sales costs or improvement of the quality of products).

Mergers and 'transformations' are treated separately in the Act. There is an obligation to notify mergers if they lead to a dominant position on the relevant market, or if any of the merging entities already had a dominant position. The competent authority must decide whether the merger will be allowed to go ahead within two months of notification (Art.11).

Procedural provisions

The Act establishes two bodies (of different hierarchical order) that deal exclusively with competition related issues: the Antimonopoly Office and the Antimonopoly Court. The Antimonopoly Office is headed by a President who is appointed and recalled by the Prime Minister. The President has extensive powers in organizing the structure of the Office (e.g., by establishing regional offices) (Arts. 17-18), and attends meetings of the Council of Ministers.

The Antimonopoly Office decides whether certain practices constitute monopolistic practices, whether they should be exempted and whether entities should be allowed to merge notwithstanding that their resulting market share will exceed the threshold. The Office is entrusted with substantial powers. It has the authority to require the cessation of the monopolistic practice and the conditions thereof (Art. 8). In doing so, the Office may order the violating entities to pay fines. Fines can amount to 15% of the after tax earnings of the entity in the preceding fiscal year. Fines may also be imposed in case economic entities fail to execute decisions of the Office (Art. 15). Firms with a dominant position may be broken up if they permanently restrain competition. While the office may object to proposed transformations of firms, it does not have the power to prescribe a particular form of division in transformation cases (Fornalczyk, 1993, p. 36).

All decisions of the Antimonopoly Office may be appealed within two weeks from the day of the receipt of the decision to the Antimonopoly Court. This Court deals exclusively with antimonopoly cases (Art. 27). The procedures followed before this Court are those of the Polish Civil Procedure Code.

SLOVAK REPUBLIC⁶³

At the time of writing the Slovak Republic applies the 1991 Czech and Slovak Federal law on competition (the Competition Protection Act), discussed in the section on the Czech Republic above. A draft law amending the Federal Act was discussed in Parliament in January 1994, but was not passed due to political developments. The new Government re-submitted the draft law to Parliament, which is expected to consider the proposed legislation by mid-1994. Until the draft law is adopted, the 1991 Federal applies.

The draft law makes safeguarding national welfare the ultimate goal of the competition authorities. This is to be achieved by controlling the abuse of economic power by dominant firms. Agreements restricting competition are prohibited if they have as object or effect restriction of effective competition (where 'effective' is to be interpreted as allowing the market to be contestable). This is an important distinction with the Federal 1991 law, which makes all restraints illicit unless they are approved or exempted by the competition authority because they advantages for the economy offset any costs. The concept of protection of effective competition found in the draft law implies that only those restrictions which harm consumer welfare are prohibited. The test of balance between harm to competition and economic efficiency advantages will be used when evaluating restrictive agreements. It is expected that the law will prohibit an exhaustive list of horizontal agreements on a *per se* basis. However, enterprises will have the opportunity to argue that an agreement fulfills the conditions for being granted an automatic exemption (the wording in this connection is the same as is found in Art. 85(3) of the Treaty of Rome). A new definition of dominant position in a relevant market is contained in the draft law. Two criteria are proposed: (1) the firm is not subject of substantial competition; or (2) the firm has economic power which allows it to behave independently in the market and it is able restrict competition. A *prima facie* presumption of dominance is established if a firm has a share of 40 per cent or more of the relevant market. The objective underlying the provisions on abuse of dominant positions is also to control economic power of the dominant firm.

The rules regarding concentrations (mergers) are very similar to the provisions of the 1989 EC Merger Control Regulation. The draft law sets two thresholds—SKK 300 million total turnover of the participants, or a 20 per cent market share in the relevant product market in the territory of Slovakia (the latter applies for certain industries where turnover is difficult to calculate). Mergers or concentrations above the threshold are subject to preventive control. The entry into force of an agreement is suspended during one month after its notification to the authorities. A criterion for determining whether the merger is acceptable is the balance between harm to competition—creation or strengthening of a dominant position in the market—and its economic advantages.

Both the existing Czech and Slovak law (1991) and the draft legislation contains a provision (Art. 18) mandating the Antimonopoly Office to analyze actions of state administrative and local bodies having impact on competition (including state aid measures) and may require these bodies to take remedial action. The Antimonopoly Office is also involved in the privatization process. It is required to provide comments on privatization plans with a view to ensuring the appropriate de-concentration of the state enterprises with a dominant position in the market. However, in such cases the Office has only an advisory role.

⁶³ What follows draws on correspondence with Milan Banas.

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